

(27,105)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 364.

ROBERT B. BROWN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on Thursday, November 21st, A. D. 1918, at New Orleans, Louisiana, before the Honorable Richard W. Walker and the Honorable Robert L. Batts, Circuit Judges, and the Honorable William I. Grubb, District Judge.

ROBERT B. BROWN, Plaintiff in Error.

versus

THE UNITED STATES OF AMERICA, Defendant in Error.

b Be it remembered, that heretofore, to-wit, on the 13th day of April, A. D. 1918, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the United States for the Southern District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3232, as follows:

c *Transcript of Record.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 3232.

ROBERT B. BROWN, Plaintiff in Error,

versus

THE UNITED STATES OF AMERICA, Defendant in Error.

Error to the District Court of the United States for the Southern District of Texas.

[Original Record Filed April 13, 1918.]

[Stamped:] U. S. Circuit Court of Appeals. Filed Jul- 19, 1918.
Frank H. Mortimer, Clerk.

1

Appellant's Preceipe.

Filed March 18, 1918.

In the District Court of the United States for the Southern District
of Texas, Corpus Christi Division.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VERSUS

ROBERT B. BROWN.

To the clerk of said court:

You will please include in the transcript of record in the above
cause the following:

a. Preceipe.

1st. Term Caption.

2d. Day Caption.

3d. Presentment of Indictment No. 82.

4th. Indictment No. 82.

5th. Arraignment and Plea of Defendant.

5 A. Order overruling Defendant's plea in Abatement.

5 B. Order overruling Defendant's Motion to have Cause tried
in Bee County.

2 6th. Motion to Quash.

7th. Order on Motion to Quash.

7 A. Order overruling Defendant's Motion for instructed Ver-
dict.7 B. Order overruling Defendant's Motion in arrest of Judg-
ment.

8th. Verdict and Judgment.

9th. Motion for New Trial.

10th. Order overruling Motion for New Trial.

11th. Order for Enlargement of defendant pending Appeal.

12th. Order extending time for filing Bills of Exceptions.

13th. Bill of Exceptions.

14th. Judgment, Sentence of Defendant.

15th. Petition for Writ of Error.

16th. Assignments of Error.

17th. Order Allowing Writ of Error.

18th. Citation and Acceptance of Service.

19th. Writ of Error Bond.

19 A. Writ of Error.

19 B. Motion for order requiring the Payment of Costs of De-
fendant's Witnesses.3 19 C. Replication and Motion in Response to Motion of
Defendant for an order requiring payment of costs of De-
fendant's Witnesses, filed March 18, 1918.

19 D. Order on Motion to tax Defendant's Costs against the U. S.
20th. Appearance Bond.
21st. Clerk's Certificate.

JAMES R. DOUGHERTY,
*Attorney for Robert B. Brown, Deft.,
Seeking Review on Writ of Error.*

Term Caption.

Monday, January 7th, 1918.

Be it remembered, that at a Regular Term of the District Court of the United States in and for the Southern District of Texas, begun and held at the Court-rooms of said Court in the City of Corpus Christi, Texas, on Monday, January 7th, A. D. 1918, it being the first Monday of said month:

Present:

Hon. Wm. B. Sheppard, Judge presiding.
Jno. F. Green, Jr., U. S. Attorney.
D. E. Simmons, Asst. U. S. Attorney.
J. A. Herring, U. S. Marshal, and
L. C. Masterson, Clerk.

And thereupon the Court being opened in due form by order of Judge, the following proceedings were had, to-wit:

Day Caption.

Tuesday, January 8th, 1918.

Court met pursuant to adjournment.

Present:

Hon. Wm. B. Sheppard, Judge presiding.
Jno. F. Green, Jr., U. S. Attorney.
D. E. Simmons, Asst. U. S. Attorney.
J. A. Herring, U. S. Marshal, and
L. C. Masterson, Clerk.

And thereupon the Court being opened in due form by order of Judge, the following proceedings were had to-wit:

Presentment of Indictment No. 82.

Entered January 8th, 1918.

The Grand Jury this day came into Court, a quorum thereof being present, and in open Court presented the following Bill of Indictment, to-wit:

D. Cr., No. 82.

THE UNITED STATES

vs.

ROBERT B. BROWN.

Charge: Murder committed on land acquired for exclusive use of United States. Vio. Secs. 272 and 275 Penal Code 1910.

Which said Indictment is ordered filed and entered upon the Criminal Docket of this Court.

5

Indictment No. 82.

Filed January 8th, 1918.

In the Name and by the Authority of the United States of America.

In the District Court of the United States of America for the Southern District of Texas, in the Fifth Circuit, Corpus Christi Division.

At a stated term of the District Court of the United States of America for the Southern District of Texas, in the Fifth Circuit begun and held at Corpus Christi, within and for the district and circuit aforesaid, on the first Monday in January, the same being the seventh day of January, in the year of our Lord Nineteen Hundred and Eighteen.

SOUTHERN DISTRICT OF TEXAS:

The Grand Jurors of the United States of America, duly selected impaneled, tried, sworn, and charged to inquire into and due presentment make of offenses against the laws of the United States of America in and for the district, division and circuit aforesaid, on their oaths in said court present:

That long prior to the 7th day of May, A. D. 1917, the United States of America acquired within the geographical limits of Beeville, Bee County, Texas, within the division, district, and circuit aforesaid, a certain lot, tract, and parcel of land for the public purpose of the said United States of America, said land being in three separate tracts as follows, to-wit:

First Tract. Being a lot one hundred (100) by one hundred and ten (110) feet out of the northeast corner of Lot Number One (1) in Block number Thirty-seven (37) in the original town of Beeville the said lot hereby conveyed is described by metes and bounds as follows: beginning at the Northeast corner of said Lot number One

at the intersection of St. Mary's Street and Bowie Street; thence South 26 degs. 31' East, with the Western boundary of St. Mary's Street one hundred (100) feet to a stake in the Northeastern boundary of said Block No. 37; thence South 63 degs. West with the boundary of a tract conveyed by G. M. Fizer to Patterson & Kavanaugh one hundred and ten (110) feet to the boundary of a lot conveyed by G. M. Fizer to A. Praeger; thence north 26 degs. 31' West, with said boundary of said Praeger lot one hundred feet to the West corner of the lot hereby conveyed, in the southern boundary of said Bowie Street; thence North 63 degs. East, with said boundary of Bowie Street, at one hundred and ten feet to the place of beginning.

Second Tract. A lot of land thirty (30) feet by one hundred (100) feet out of Block No. Thirty-seven (37) in the original town of Beeville, described by metes and bounds as follows:

Beginning at a point on Bowie Street one hundred and ten (110) feet West of the northeast corner of Block number 37 of the Original town of Beeville, running South one hundred (100) feet, parallel with St. Mary's Street; thence West thirty (30) feet parallel with Bowie Street; thence north along an alley one hundred (100) feet to Bowie Street; Thence East thirty (30) feet along Bowie Street to the place of beginning, and being the same property conveyed to A. Praeger by G. M. Fizer by deed recorded in Volume "Q" on page 499 of the Deed Records of Bee County, Texas.

Third Tract. A lot or parcel of land fifty (50) by one hundred and forty (140) feet, out of said Block number Thirty-seven (37) of the Original Town of Beeville, described by metes and bounds as follows:

Beginning at a point on the eastern boundary line of said Block number Thirty-seven, and on the western boundary line of St. Mary's Street, whence the northeast corner of said Block Thirty-seven bears North 26 degs. 31' west along said boundary line one hundred (100) feet; Thence south 26 degs. 31' east along said boundary line fifty (50) feet; Thence south 63 degs. west one hundred and forty (140) feet to an alley; Thence north 26 degs. 31' west with said alley fifty (50) feet; thence north 63 degs. east one hundred and forty feet to the place of beginning, and being the same property conveyed to A. Praeger by Thomas Tyson and others by deed recorded in Volume "F-2" on pages 415-416 of the Deed Records of Bee County, Texas.

That after the acquisition of said land, and long before the 7th day of May, A. D. 1917, to-wit, on the 21st day of September, A. D. 1915, constitutional and exclusive jurisdiction over the site of said lot, tract and parcel of land was ceded to the United States of America by the said State of Texas in the manner provided by law; that from the date of the deed of cession of jurisdiction to the present time the site aforesaid has been under the exclusive jurisdiction of the United States of America and was under the exclusive jurisdiction of

the United States of America, on May 7, 1918, and now is under the exclusive jurisdiction of the United States of America.

That one Robert B. Brown, on the 7th day of May, A. D. 1917, in said district, division and circuit, aforesaid, and on that said lot, tract and parcel of land hereinbefore more particularly described theretofore acquired by the United States of America for the exclusive use of the United States of America for its public purposes, the said lot, tract and parcel of land then and there being a place under the sole and exclusive jurisdiction of the United States of America and out of the jurisdiction of any particular state, and within the jurisdiction of this court, constitutional and exclusive jurisdiction over said lot, tract and parcel of land having been ceded to the United States of America by the said State of Texas in the manner provided by the law long prior to the commission of the offense hereinafter alleged; did unlawfully, willfully and purposely, and with malice aforethought, and with a deadly weapon, to-wit, a pistol held in his hands and loaded with cartridges charged with gun powder and metal bullets, make an assault upon the body of one James P. Hermes, a human being; and did unlawfully, willfully, purposely, and with his malice aforethought, and with intent to kill and murder, then and there shoot off and discharge the contents of said pistol upon and into the body of the said James P. Hermes, and the said Robert B. Brown, with one of the said bullets aforesaid, out of the said pistol aforesaid, then and there by force of the gun powder aforesaid, by the said Robert B. Brown discharged and shot off as aforesaid, then and there willfully, unlawfully, purposely, and with malice aforethought, did strike, penetrate and wound him, the said James P. Hermes, in and upon the anterior surface of the thigh, breaking the bone of the upper leg of the said James P. Hermes, and with one of the said bullets aforesaid, discharged from said gun aforesaid, by the said Robert B. Brown, then and there willfully, unlawfully, purposely and with malice aforethought, did strike, penetrate and wound him, the said James P. Hermes, in and upon the left side of the chest coursing under the skin and lodging on the point of the left shoulder of the said James P. Hermes; and with one of the said bullets aforesaid, discharged from said gun as aforesaid, by the said Robert B. Brown, then and there willfully, unlawfully, purposely and with malice aforethought, did strike, penetrate and wound him, the said James P. Hermes, in and upon the left side of the chest, coursing under the skin and lodging under the left armpit of the said James P. Hermes; and with one of the said bullets aforesaid, discharged from said gun as aforesaid, by the said Robert B. Brown, then and there willfully, unlawfully, purposely, and with malice aforethought did strike, penetrate and wound him, the said James P. Hermes, in and upon the chest about one inch to the left of the breast bone and between the fifth and sixth ribs, tearing a hole in the thoracic aorta of the said James P. Hermes; the said bullets aforesaid inflicting upon him, the said James P. Hermes, wounds of which said wounds so inflicted as aforesaid, on the said lot, tract and parcel of land hereinbefore referred to,

as aforesaid, the said James P. Hermes did then and there die.

9 And so the Grand Jurors aforesaid, upon their oaths aforesaid, do further say and charge, that upon the day aforesaid, at the place aforesaid, on the said land acquired by the United States of America for its exclusive use, as aforesaid, with the said deadly weapon, and in the manner and form aforesaid, and used as aforesaid, the said Robert B. Brown did unlawfully, willfully, purposely, and with his malice aforethought, kill and murder the said James P. Hermes, a human being; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

G. M. WILSON,
Foreman of the Grand Jury.
JNO. E. GREEN, JR.,

United States Attorney, Southern District of Texas.

Indorsed: Indictment. Murder committed on land acquired for exclusive use of United States. Vio. Secs. 272 and 275 Penal Code, 1910. A true bill. G. M. Wilson, Foreman. Filed this 8th day of Jan'y, A. D. 1918.

Arraignment and Plea of Defendant.

Entered January 11th, 1918.

In the District Court of the United States for the Southern District of Texas.

Be it remembered, that at a Regular Term of the District Court of the United States for the Southern District of Texas, held in and for the District aforesaid, at the Court-rooms of said Court in the City of Corpus Christi on Friday, the 11th day of January, A. D. 1918.

Present, the Honorable Wm. B. Sheppard, Judge, presiding; the following among other proceedings, were had, to-wit:

10 District Court, Criminal Docket.

No. 82.

THE UNITED STATES

vs.

ROBERT B. BROWN.

This cause coming on this day to be heard, came the United States by her Attorney and announced ready for trial, and the Defendant, Robert B. Brown in his own proper person and by attorneys appeared and announced ready, and the said defendant being arraigned plead not guilty, and thereupon came the selection of a jury of

twelve good and lawful men, and the following named jurors were selected: 1, W. H. Griffin, 2, R. P. Bracht, 3, J. G. Hooper, 4, G. C. Gillett, 5, J. S. Williams, and three others subject to challenge, but the trial not being concluded the further consideration of the case was postponed until tomorrow, and the jurors selected committed to the custody of the Marshal under instructions from the Court.

It is further ordered that the Marshal furnish meals and lodging to the jurors selected and to be selected for the trial of this case and to the bailiff in attendance on the jurors.

Order Overruling Plea in Abatement.

Filed Jan'y 21st, 1918.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division, January Term, A. D. 1918.

No. 82, D. Cr.

UNITED STATES OF AMERICA

vs.

ROBERT B. BROWN.

Be it remembered that on this the 11th day of January, A. D. 1918, came on to be heard defendant's plea in abatement
11 and motion to compel the Government to desist from further proceedings with this cause in Nueces County, and the United States by its District Attorney, and the defendant in person and by his counsel, appeared and announced ready thereon, and the Court having considered said motion, and the evidence in support thereof, is of the opinion that same is without merit, and should be overruled, which is accordingly done, to which the defendant Robert B. Brown, in open court then and there excepted.

Ordered and adjudged at Corpus Christi, Texas, in the District and Division aforesaid.

WM. B. SHEPPARD,

Judge.

Order Overruling Defendant's Motion to Have Cause Tried in Bee County.

Filed January 21st, 1918.

In the United States District Court for the Southern District of Texas, Corpus Christi Division, January Term, A. D. 1918.

No. 82, D. Cr.

UNITED STATES OF AMERICA

vs.

ROBERT B. BROWN.

Be it remembered that on this the 11th day of January, A. D. 1918, came on to be heard the defendant's motion to require the case tried in the county of Bee, where the homicide occurred, and thereupon came to the United States by its District Attorney, and defendant in person and by his counsel, and both announced ready for trial, and the Court having heard said motion and testimony, and argument of counsel is of the opinion that said motion is without merit and
12 should be denied, which is accordingly done, and whereupon the defendant in open Court, to the order of the Court in denying said motion, excepted.

Ordered and adjudged at Corpus Christi, Texas, in the District and Division aforesaid.

WM. B. SHEPPARD,

Judge.

Motion of Defendant to Quash Indictment.

Filed January 11th, 1918.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

No. 82, D. Cr.

UNITED STATES OF AMERICA

vs.

ROBERT B. BROWN.

To the Hon. Wm. B. Sheppard, Judge of said Court:

Now comes the defendant, Robert B. Brown, and moves the Court to quash the Indictment herein returned against him, because:

1.

Said indictment charged this defendant with no offense against the laws of the United States.

Wherefore, this defendant respectfully moves the Court to quash said indictment, and that this defendant be dismissed.

Respectfully submitted,

DOUGHERTY & DOUGHERTY,
G. R. SCOTT, BOONE & POPE,
H. S. BONHAM,
JAMES F. ODEM.

13 *Order Overruling Defendant's Motion to Quash.*

Filed Jan'y 21st, 1918.

In the United States District Court for the Southern District of Texas, Corpus Christi Division, January Term, A. D. 1918.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

Be it remembered that on this the 11th day of January, A. D. 1918, and before announcement of ready for trial, came on to be heard the defendant's motion to quash the indictment in this cause, and the Court having heard and considered the same, and the argument of counsel thereon, is of the opinion that said motion should be denied, and it is now ordered and adjudged that said motion be in all things refused, to which order and judgment of the Court, defendant then and there in open Court excepted.

Ordered and adjudged at Corpus Christi, Texas, in the District and Division aforesaid.

WM. B. SHEPPARD,
Judge.

14 *Order Overruling Defendant's Motion to Instruct Jury to Return Verdict for Defendant.*

Filed 17th day of January, 1918.

In the United States District Court for the Southern District of Texas, Corpus Christi Division, January Term, A. D. 1918.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

Be it remembered that on the 17th day of January, A. D. 1918, after the introduction of the testimony in this cause, but before the jury was charged or instructed in this cause, defendant presented his motion to instruct the jury to return a verdict in his favor, and the Court having considered the motion and argument of counsel thereon is of the opinion that the same should be denied, which is accordingly now done, to which action of the Court in refusing to grant said motion to instruct the jury the defendant then and there in open Court excepted.

Ordered and adjudged at Corpus Christi, Texas, in the District and Division aforesaid.

WM. B. SHEPPARD,

Judge.

15 *Order Overruling Defendant's Motion in Arrest of Judgment.*

Filed January 19th, 1918.

In the United States District Court for the Southern District of Texas, Corpus Christi Division, January Term, A. D. 1918.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

Be it remembered that on this the 19th day of January, A. D. 1918, came on to be heard defendant's motion in arrest of judgment, and thereupon appeared the United States by its District Attorney, and the defendant in person and by his attorneys and announced ready for trial on said motion, and the Court having considered the same, and the argument of counsel thereon, is of the opinion that same should be and it is now hereby denied and overruled, to which

action of the Court in denying and overruling said motion the defendant then and there in open Court excepted.

Ordered and adjudged at Corpus Christi, Texas, in the District and Division aforesaid,

WM. B. SHEPPARD,

Judge.

Verdict and Judgment.

Entered January 19th, 1918.

In the District Court of the United States for the Southern District of Texas,

Be it remembered, that at a Regular Term of the District Court of the United States for the Southern District of Texas, held in and for the District aforesaid, at the Court-rooms of said Court in the City of Corpus Christi on Saturday the 19th day of January, A. D. 1918,

Present, the Honorable Wm. B. Sheppard, Judge, presiding; the following among other proceedings, were had, to-wit:

District Court, Criminal Docket,

No. 82.

THE UNITED STATES

VS.

ROBERT B. BROWN.

This cause again coming on this day to be heard, came the United States by her Attorney and announced ready for trial, and the Defendant, Robert B. Brown in his own proper person and by attorneys appeared and announced ready, and thereupon came a jury of twelve good and lawful men, to-wit:

1. W. H. Griffin; 2. R. P. Bracht; 3. J. G. Hooper; 4. G. C. Gillett; 5. J. S. Williams; 6. F. V. Armit; 7. J. M. Johnson; 8. J. R. Wall; 9. D. Outman; 10. W. H. Koepsel; 11. R. G. Almond; 12. John Kenedy, Jr., who having been duly tried, impaneled and sworn as required by law, and having heard the plea of the defendant, the evidence and the argument of counsel and received the charge of the Court, on this day brought into open Court their verdict in words and figures as follows, to-wit:

No. 82, D. Cr.

"UNITED STATES

VS.

ROBERT B. BROWN.

We, the Jury find the defendant guilty of Murder in the second degree.

(Signed)

W. H. GRIFFIN,
Foreman."

It is therefore, considered by the Court, that the Defendant Robert B. Brown, be and he is hereby adjudged guilty of murder in the second degree, as charged in the indictment and as found by the jury, and it is ordered that he be remanded to the custody of the Marshal to await the judgment and sentence of the Court.

Defendant's Motion for New Trial.

Filed January 19th, 1918.

In the United States District Court for the Southern District of Texas, Corpus Christi Division, January Term, 1918.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

To the Honorable Wm. B. Sheppard, Judge of said Court:

And now comes Robert B. Brown, defendant in the above styled and numbered cause in person and by his several attorneys, to-wit, James R. Dougherty, Gordon Boone, H. S. Bonham and James F. Odem, and moved the Court to set aside the verdict rendered herein, and to grant a new trial, and for reasons therefor shows to the Court the following:

1.

The Court erred in overruling defendant's plea in abatement and motion to require the Court to take no further action in the case at Corpus Christi, in Nueces County, Texas.

2.

Because the Court erred in refusing to grant the motion of defendant to have the cause tried in the County of Bee, where the offense charged, being a capital one, was alleged to have been committed.

18

3.

Because the Court erred in overruling defendant's motion to quash the indictment.

4.

Because the verdict is contrary to the law of the case.

5.

Because the verdict is not supported by any evidence in the case.

6.

Because the evidence does not disclose that the United States ever acquired title to the tract of land upon which the offense is alleged to have been committed.

7.

Because there is no evidence that the offense was ever committed within the County of Bee, or within the Southern District of Texas, and, therefore, it is not shown that said offense, if any, was committed within the jurisdiction of this Court.

8.

Because the Court, upon the trial of this case, admitted incompetent evidence, offered by the United States.

9.

Because the Court, upon the trial of this case, excluded competent evidence, offered by the defendant.

10.

Because the Court improperly instructed the jury, to defendant's prejudice, in the following respects, viz:

19

(a) Because the charge does not limit the jurisdiction of the United States to a lot or parcel of land, over which exclusive jurisdiction had been ceded for one of the specific purposes for

which cession is permitted by the Revised Statutes of the State of Texas, and the Constitution of the United States.

(b) Because the charge is erroneous, in that it declares that the instrument executed by the Governor of the State of Texas, ceded exclusive jurisdiction to the United States, it not having been shown that the United States ever acquired title to the tract of land where the homicide occurred.

(c) And because the instrument of cession does not appear to have been made for one of the express purposes, to-wit, for a post office building, for which cession was, or is permitted by the laws of this state, or the Constitution of the United States, but appears to have been made for the general public purposes of the United States, and therefore beyond the power of the Governor of the state to execute, and,

(d) Because it appears that cession was made by the Governor and not by the Legislature of the State of Texas, and therefore the cession by the Governor of the land to the United States was void.

11.

Because the charge of the Court failed to submit to the jury defendant's theories of his defense in this case.

12.

Because the Court did not submit the offense of assault with intent to murder to the jury.

20

13.

Because the charge improperly instructed the jury that as a matter of law the instrument executed by the Governor of the State of Texas, introduced in evidence, ceded to the United States jurisdiction over the land and territory contained within the boundaries of the lot or parcel of land described in the indictment, when at least this was a matter of fact to have been submitted to the jury on proper instruction, dependent upon whether or not the United States acquired the title to the land, and if it did acquire it was for one of the specific purposes which authorized the transfer of sovereignty before cession of jurisdiction could be treated as a proven fact, since the law requires that the United States shall have acquired title to the land, and that cession was made by the Governor for one of the specific purposes, to-wit, a post office, etc, before the Governor would be authorized to execute such instrument of cession, or the Constitution of the United States would permit the cession of sovereignty.

14.

Because said charge failed to submit fairly to the jury the issue as to whether or not the fourth shot fired by defendant was fired accidentally or not, but was confused with other issues.

15.

Because the Court improperly charged the jury that before the defendant could resist the attack upon him, that he was compelled to retreat, and thereby improperly restricted defendant's right of self defense, and to act upon the appearance of danger; and this necessity to retreat, upon the part of defendant, was improperly emphasized in several portions of the Court's charge, to-wit, at Paragraphs 10, 11, 13-b, 13 c, 14 and 15, it appearing from the uncontradicted evidence, at the time of the killing, that the defendant was rightfully at the scene of the homicide.

21 16.

Because the Court improperly refused, to defendant's prejudice, to give Defendant's Requested Charge No. 1.

17.

Because the Court improperly refused, to defendant's prejudice, to give defendant's Charge No. 2.

18.

Because the Court improperly refused, to defendant's prejudice, to give defendant's Charge No. 4.

19.

Because the Court improperly refused, to defendant's prejudice, to give Defendant's Charge No. 5.

20.

Because the Court improperly refused, to defendant's prejudice, to give Defendant's Charge No. 6.

21.

Because the Court improperly refused, to defendant's prejudice, to give Defendant's Charge No. 7.

22.

Because the Court improperly refused, to defendant's prejudice, to give Defendant's Charge No. 8.

23.

Because the Court improperly refused, to defendant's prejudice, to give Defendant's Charge No. 9.

24.

Because the Court improperly refused, to defendant's prejudice, to give Defendant's Charge No. 10.

25.

Because the Court improperly refused, to defendant's prejudice, to give Defendant's Charge No. 12.

26.

Because the Court improperly refused, to defendant's prejudice, to give Defendant's Charge No. 13.

27.

Because the Court improperly refused, to defendant's prejudice, to give Defendant's Charge No. 14.

28.

Because the Court did not charge upon the effect of the previous assaults made upon the defendant by the deceased.

29.

Because the charge did not distinguish as to the degree of culpability that would result to defendant should the jury find that the death of the deceased resulted from some shot other than the fourth, there being evidence that it did not result from the fourth shot.

30.

Because the Court erred in refusing the motion of defendant to instruct a verdict of not guilty at the close of all of the evidence in the case.

31.

Because the Court erred in admitting in evidence, over the objection of the defendant thereto made at the time, the certified copy of the deed from Ed. Swanton and Caroline Swanton to the United States, offered in evidence by the United States on the trial of said cause.

32.

Because the Court erred in admitting in evidence, over the objection of defendant, thereto made at the time, the certified copy of deed from A. Praeger and Lizzie Praeger to the United States, offered in evidence on the trial of said cause by the United States.

33.

Because the Court erred in admitting in evidence, over the objection of the defendant, thereto made at the time, the original deed from Ed. Swanton and Caroline Swanton to the United States, offered in evidence by the United States on the trial of said cause.

34.

Because the Court erred in admitting in evidence, over the objection of the defendant, thereto made at the time, the original deed from A. Praeger and Lizzie Praeger to the United States, offered in evidence on the trial of said cause by the United States.

35.

Because the Court erred in admitting in evidence, over the objection of the defendant, thereto made at the time, the certified copy of deed of cession from James E. Ferguson, Governor of the State of Texas, to the United States, offered in evidence by the United States on the trial of said cause.

24

36.

Because the Court erred in admitting in evidence, over the objection of the defendant, thereto made at the time, the original deed of cession from James E. Ferguson, Governor of the State of Texas, to the United States, offered in evidence by the United States on the trial of said cause.

37.

Because the Court erred in overruling the motion of defendant to strike from the evidence the deed introduced by the United States from Ed. Swanton and Caroline Swanton to the United States, and deed from A. Praeger and Lizzie Praeger to the United States, and also the deed of cession from James E. Ferguson, Governor of the State of Texas, to the United States, because the evidence shows that the same had not been filed, and notice thereof given, as prescribed by the statutes of the state of Texas, before the same could be introduced in evidence.

38.

Because the Court erred in sustaining the objection of the Government, to the question asked by defendant's counsel of the witness Lewis Roy, testifying in behalf of the Government, as to the interest of his employer, J. C. Wood, in the private prosecution of this case and in refusing to allow said witness to answer said question.

39.

Because the Court erred in overruling the objection of the defendant to the question asked by the Government of the witness Dr. J. H. Lander, as to which shot, in his opinion, severed the aorta, and in permitting said witness to answer said question, and in admitting the question and answer in evidence over the objection of defendant thereto made at the time.

25

40.

Because the Court erred in permitting the Government, over the objection of defendant, thereto made at the time, to ask the witness, Dr. J. H. Lander, testifying as a witness in behalf of the Government, the question as to his opinion as to the position in which the deceased would have had to have been in in order to have been fatally wounded by the fourth shot, and in permitting said witness, over said objection, to answer said question.

41.

Because the Court erred in permitting the Government, over the objection of defendant, thereto made at the time, to ask the witness, Dr. J. H. Lander, to state whether in his opinion, the deceased could have moved about, etc., after having received the wound in the aorta, and in permitting said witness to answer said question over the objection of the defendant thereto made at the time.

42.

Because the Court erred in sustaining the objection of the Government to the question propounded by defendant's counsel to the witness, Jack Carvel, testifying in behalf of the defendant on the trial of said case, as to why defendant, Robert B. Brown, had ceased going to the Southern Pacific Depot, and in not permitting the witness to answer said question.

43.

Because the Court erred in sustaining the objection of the Government to the question asked the witness, Rufus Taylor, by the defendant's counsel, as to the statement made to him by the deceased, James P. Hermis, sometime before the difficulty, in which the said Hermis made statements showing the condition of his mind, and the nature of his feelings toward defendant, and in not permitting said witness to answer said question.

26

44.

Because the Court erred in sustaining the objection of the Government to the testimony of the witness, Paul Perkins, testifying in be-

half of the defendant, to the effect that defendant, Robert B. Brown, ceased going to the depot in order to avoid difficulty with the deceased, James P. Hermis, and in refusing to permit said testimony to go to the jury.

45.

Because the Court erred in admitting in evidence, over the objection of the defendant thereto made at the time, the testimony of the witness, Paul Perkins, on cross-examination by the Government, as to the result of the trial of James P. Hermis for his difficulty with John Rigby.

46.

Because the Court erred in sustaining the objection of the Government thereto made, and in not permitting the defendant, Robert B. Brown, testifying as a witness in his own behalf, to state the instructions given him by Mr. Hare, the superintendent of the Government building, with reference to the excavated earth.

47.

Because the Court erred in sustaining the objection of the Government to the testimony of the defendant, Robert B. Brown, testifying in his own behalf, as to his former difficulties and troubles with the deceased, James P. Hermis, and in not permitting the defendant to testify thereto.

48.

Because the Court erred in overruling the objection of the defendant, thereto made at the time, as to the testimony of the witness, Dr. Orville Egbert, testifying as a witness for the Government in rebuttal, as to his opinion on hypothetical questions propounded by the Government.

49.

Because the Court erred in admitting in evidence, over the objection of defendant thereto, the testimony of the witness B. W. Klipstein, offered by the Government in rebuttal, as to the general reputation of the deceased, James P. Hermis, as to being a peaceful and law-abiding citizen.

50.

Because the Court erred in admitting in evidence, over the objection of the defendant thereto, the testimony of the witness, J. C. Wood, offered by the Government in rebuttal, as to the general reputation of the deceased, James P. Hermis, as to being a peaceful and law-abiding citizen.

51.

Because the Court erred in admitting in evidence, over the objection of the defendant thereto, the testimony of the witness, Jim Wright, offered by the Government in rebuttal, as to the general reputation of the deceased, James P. Hermis, as to being a peaceful and law-abiding citizen.

52.

Because the Court erred in admitting in evidence, over the objection of the defendant thereto, the testimony of the witness, Chas. F. Troy, offered by the Government in rebuttal, as to the general reputation of the deceased, James P. Hermis, as to being a peaceful and law-abiding citizen.

28 Wherefore he prays that for the errors pointed out said verdict be set aside, and that he be granted a new trial herein.

ROBERT B. BROWN,

Defendant,

By G. R. SCOTT,

BOONE & POPE,

DOUGHERTY & DOUGHERTY,

H. S. BONHAM &

J. F. ODEM,

*His Attorneys.**Order Overruling Motion for New Trial.*

Filed January 19, 1918.

In the United States District Court for the Southern District of Texas, Corpus Christi Division, January Term, A. D. 1918.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

Be it remembered that on this the 19th day of January, A. D. 1918, came on to be heard defendant's motion for a new trial, and hereupon appeared the United States by its District Attorney, and the defendant in person and by his attorneys and announced ready for trial on said motion, and the Court having considered the same, and the argument of counsel thereon, is of the opinion that same should be and it is now hereby denied and overruled, to which action of the Court in denying and overruling said motion the defendant then and there in open Court excepted.

Ordered and adjudged at Corpus Christi, Texas, in the District and Division aforesaid.

WM. B. SHEPPARD,
Judge.

29 *Order for Enlargement of Defendant Pending Appeal.*

Filed March 18th, 1918.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

On the 18th day of March, A. D. 1918, after sentence pronounced upon said Robert B. Brown, the Court orders that in accordance with Section 2, of Rule 37 of the Circuit Court of Appeals for the 5th Circuit, the defendant aforesaid may be enlarged upon bond pending a hearing of the cause in the Circuit Court of Appeals for the Fifth Circuit of the United States, said bond to be approved by the clerk of this Court.

It is further ordered that said bond is now fixed in the sum of \$25,000.00, Twenty-Five Thousand Dollars, in terms as provided by said Rule and Section in such case; said bond to be approved by the clerk of this Court, and shall operate as a supersedeas in the case of suing out Writ of Error by said defendant pending a determination of the case in the Circuit Court of Appeals for the 5th Circuit.

WM. B. SHEPPARD,
Judge.

30 *Order Extending Time for Filing Bill of Exceptions.*

Filed January 19th, 1918.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division, January Term, A. D. 1918.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

It is hereby ordered that the time for presentation and allowance of bill of exceptions by Robert B. Brown, defendant in the above

styled and numbered cause, be, on this the 19th day of January, A. D. 1918, extended for a period of ninety days from and after the close of this term of Court.

Ordered and adjudged this 19th day of January, A. D. 1918.

WM. B. SHEPPARD,
Judge.

* * * * *

Bill of Exceptions.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

No. 82, D. Cr.

UNITED STATES OF AMERICA

vs.

ROBERT B. BROWN.

This was a criminal prosecution by the United States of America on Indictment in Cause No. 82, charging the defendant, 31 Robert B. Brown, with the offense of murder, which, at the trial, resulted in the conviction of the defendant above named of the offense of murder in the second degree.

Bill of Exceptions No. 1

Be it remembered, That on the 11th day of January, A. D. 1918, at a regular term of said Court, in due order of pleading, before any other plea presented or entered, and before any announcement, and before the above cause was called for trial, the defendant filed and presented in open Court to the Court for its action, his motion and plea in abatement, in words and substance as follows:

No. 82, D. Cr.

UNITED STATES OF AMERICA

vs.

ROBERT B. BROWN.

In the United States District Court for the Southern District of Texas, Corpus Christi Division.

To the Hon. District Court for the Southern District of Texas:

Now comes the defendant, Robert B. Brown, defendant herein, and represents to the Court that by an Indictment filed on the 29th day of May, A. D. 1917, in Cause No. 74 D. Cr, styled United States

of America vs. Robert B. Brown, a copy of which is attached hereto, and marked Exhibit A, and made a part of this motion, this defendant was charged with the same offense as he is now charged with in the above numbered and styled cause, as will be more particularly shown by reference to the copy of the indictment filed in this cause, No. 82, on the 8th day of January, A. D. 1918, also attached hereto, and made part hereof.

32

1.

That this defendant has been, ever since the return of the Indictment in said Cause No. 74, in custody of the United States, incarcerated in jail, awaiting trial.

2.

This defendant says that immediately after the filing of the indictment in said cause No. 74, D. Cr. that he, by motion duly made before this Court, at a former term hereof, on 29 day of May, A. D. 1917, he insisted, by motion, upon his right to be tried, as required by Section 40 of the Judicial Code, in the county of Bee, where the offense, which was one punishable by death, was alleged to have been committed; that thereupon the United States of America, through its District Attorney, joined issue with this defendant upon his right to be tried in said county, and a trial was had before this Honorable Court thereon at said May term, and after hearing an order was entered on the 29th day of May, A. D. 1917, that the trial of the offense, charged by the Indictment in Cause No. 74 D. Cr. should be had in said county of Bee; that said Judgment so entered by this Court at said term was never vacated, modified or appealed from, and that said May Term had expired prior to the date at which this term of this Court convened. That there was also entered by this Court at said May Term, by agreement of the plaintiff and defendant in said cause, an order setting down this case for trial at Beeville, Texas, in the county of Bee on the first Monday in July, 1917. That this order also has never been set aside or modified. That this term of this Court convened on the 7th day of January, A. D. 1918; that said term was never held in Bee County, and said Cause No. 74 D. Cr. remained pending in said county.

3.

That after the convening of this Court on January 7th, 1918, in his division, it appearing to this defendant that notwithstanding the order entered upon the trial of the motion in Cause No. 74, determining that this cause should be tried in the county of Bee, that this Court was about to try said Cause No. 74 at this division, this defendant thereupon presented his plea in abatement and motion to require the United States to take no further action in said Cause No. 74 at this term, and to recognize the order requiring that the Cause should be tried in the county of Bee; that said motion coming on to be heard in said Cause No. 74, this Court

33

required that answer be made thereto by the United States before adjudication should be made thereon, and set said motion down for hearing at 10 o'clock A. M. on the 8th day of January, A. D. 1918.

4.

That — the time set down for such hearing, the United States of America, having failed to file said answer, as required, appeared in Court at the Corpus Christi Division, by its district attorney, and requested that said cause No. 74 be passed until 2 o'clock P. M. of said day, which said request was granted; that at 2 o'clock P. M. of said day the district attorney, still not having filed said answer, made a motion to the Court to enter a nolle pros. in said Cause No. 74, and to hold the defendant in custody to await the action of the grand jury then in session, in Nueces County; which said motion was, over the objection of the defendant, recognized and granted by the Court, a nolle pros. entered therein, and no hearing on defendant's said motion was had. That said nolle pros. was not made, entered or approved at the term of this Court, ordered to be held in Beeville, Bee County, Texas, but, as before stated, it was entered over the objection of this defendant at Corpus Christi.

5.

This defendant says that said nolle pros. so entered, was erroneous, and null and void for the following reasons, to wit:

34 (a) Because this defendant charges the fact to be that the nolle pros. was entered by the Dist. Atty. solely for the purpose of avoiding the effect of the judgment heretofore entered in Cause No. 74 on the 29 day of May, A. D. 1917, sustaining defendant's right, under Section 40 of the Judicial Code, to be tried in the county of Bee, and by indirection deprived this defendant of the right to have said cause tried in said county where the offense was committed, and in this connection, defendant says that Indictments in Cause No. 74 and this case are in terms substantially identical, and charges the defendant with the same offense, as before stated, and that thus by indirection this defendant is deprived of the right to be tried in the county where the offense is alleged to have been committed.

(b) This defendant says that such nolle pros. could not be entered at this term of the Court in Corpus Christi Division, nor could this Court, by any order entered at this division, and at this term, deprive this defendant of his right to be tried in Bee County, where said cause No. 74 now pends, and that said entry of nolle pros. in Nueces County of said Cause pending in Bee, and the judgment, or order approving said nolle pros. is void and could, if at all, only be entered in the county of Bee where said Cause No. 74 has been transferred.

Wherefore, this defendant says that said nolle pros. and order approving same, entered in Corpus Christi, in Nueces County, did not affect defendant's right heretofore determined by this Court, to be tried in the county of Bee, and he now pleads such judgment in bar of further action of this Court in Nueces County, and he prays that this Court, at this division in Nueces County, take no further action herein, and that defendant's right to be tried in the county of Bee be recognized by this Court.

Defendant, as a part of this motion, attaches hereto certified copies of all pleas, motions and orders entered in said cause No. 74,
35 and prays that same be considered as a part of this motion.

ROBERT B. BROWN,
By DOUGHERTY &
DOUGHERTY,
G. R. SCOTT,
BOONE & POPE,
H. S. BONHAM &
J. F. ODEM,

His Attorneys.

STATE OF TEXAS,

County of Nueces:

Before me, the undersigned authority, on this day personally appeared Robert B. Brown, defendant herein, who being duly sworn on oath says that the allegations of fact in the foregoing motion are true and correct.

ROBERT B. BROWN.

Subscribed and sworn to before me this the — day of January,
A. D. 1918.

[SEAL.]

J. B. CHAMBERS,
Notary Public, Nueces Co., Texas.

EXHIBIT A.

In the Name and by the Authority of the United States of America.

In the District Court of the United States of America, for the Southern District of Texas, in the Fifth Circuit, Corpus Christi Division.

At a Stated Term of the District Court of the United States of America, for the Southern District of Texas, in the Fifth Circuit, Begun and Held at Corpus Christi, Within and for the District, Division and Circuit Aforesaid, on the Fourth Monday in May, the Same Being the Twenty-eighth Day of May, in the Year of Our Lord, Nineteen Hundred and Seventeen.

36 SOUTHERN DISTRICT OF TEXAS:

The Grand Jurors of the United States of America, duly selected, impaneled, tried, sworn and charged to inquire into and due present-

ment make of offenses against the laws of the United States of America in and for the district and circuit aforesaid, on their oaths in said Court present:

That long prior to the 7th day of May, A. D. 1917, the United States of America acquired within the geographical limits of Beeville, Bee County, Texas, within the division, district, and circuit aforesaid, a certain lot, tract and parcel of land for the public purposes of the said United States of America, said land being in three separate tracts as follows, to wit:

First Tract: Being a lot one hundred (100) by one hundred and ten (110) feet out of the northeast corner of Lot number One (1) in Block Number Thirty-Seven (37) in the original town of Beeville; the said lot hereby conveyed is described by metes and bounds as follows: Beginning at the northeast corner of said Lot Number One, at the intersection of St. Marys' Street and Bowie Street; thence South 26 degs. 31' East, with the Western boundary of St. Marys Street One hundred (100) feet to a stake in the Northeastern boundary of said Block No. 37; Thence South 63 degs. West with the boundary of a tract conveyed by G. M. Fizer to Patterson & Kavanaugh one hundred and ten (110) feet to the boundary of a lot conveyed by G. M. Fizer to A. Praeger; thence North 26 degs. 31' West, with said boundary of said Praeger's lot one hundred feet to the west corner of the lot hereby conveyed; in the southern boundary of said Bowie Street; thence North 63 degs. East with said boundary of Bowie Street, at one hundred and ten feet to the place of beginning.

Second Tract: A lot of land thirty (30) feet by one hundred (100) feet out of Block No. Thirty-Seven (37) in the Original Town of Beeville, described by metes and bounds as follows:

37 Beginning at a point on Bowie Street one hundred and ten (110) feet West of the Northeast corner of Block Number 37 of the Original Town of Beeville, running South One hundred (100) feet, parallel with St. Marys Street, thence West thirty (30) feet parallel with Bowie Street; Thence North along an alley one hundred (100) feet to Bowie Street; Thence East thirty (30) feet along Bowie Street to the place of beginning and being the same property conveyed to A. Praeger by G. M. Fizer by deed recorded in Volume "G", on page 499 of the deed records of Bee County, Texas.

Third Tract: A lot or parcel of land, fifty (50) by one hundred and forty (140) feet out of said Block Number Thirty-Seven (37) of the Original town of Beeville, described by metes and bounds as follows:

Beginning at a point on the eastern boundary line of said Block Number Thirty Seven, and on the western boundary line of St. Mary's Street, whence the northeast corner of said Block Thirty-Seven bears North 26 degs. 31' West long said boundary line one hundred (100) feet; thence South 26 degs. 31' East along and boundary line fifty (50) feet; thence South 63 degs. West one hundred and forty (140) feet to an alley; Thence North 26 degs. 31' West with

said alley fifty (50) feet; Thence North 63 degs. east one hundred and forty feet to the place of beginning, and being the same property conveyed to A. Prager by Thomas Tyson and others by deed recorded in Volume "F-2," on pages 415-416 of the deeds records of Bee County, Texas.

That after the acquisition of said land, and long before the 7th day of May, A. D. 1917, exclusive jurisdiction over the site of said lot, tract and parcel of land was ceded to the United States of America by the said State of Texas in the manner provided by law; that from the date of the deed of cession of jurisdiction to the present time the site aforesaid has been under the exclusive jurisdiction of the United States and was under the exclusive jurisdiction of
38 the United States on May 7, 1917, and now is under the exclusive jurisdiction of the United States.

That one Robert B. Brown, on the 7th day of May, A. D. 1917, in said district, division and circuit, aforesaid, and on that said lot, tract and parcel of land hereinbefore more particularly described, theretofore acquired by the United States of America for the exclusive use of the United States of America for its public purposes, the said lot, tract and parcel of land then and there being a place under the sole and exclusive jurisdiction of the United States of America and out of the jurisdiction of any particular state and within the jurisdiction of this Court the said exclusive jurisdiction of the United States of America having been ceded to the United States of America by the said State of Texas, in the manner provided by law long prior to the commission of the offense hereinafter alleged; did unlawfully, wilfully, and purposely and with malice aforethought, and with a deadly weapon, to wit, a pistol held in his hands and loaded with cartridges charged with gun powder and metal bullets, make an assault upon the body of one James P. Hermes, a human-being; and did unlawfully, wilfully, purposely, and with his malice aforethought, and with intent to kill and murder, then and there shoot off and discharge the contents of said pistol upon and into the body of the said James P. Hermes; and the said Robert B. Brown with one of said bullets aforesaid, out of the said pistol aforesaid, then and there by force of the gun powder aforesaid, by the said Robert B. Brown discharged and shot off, as aforesaid, then and there wilfully, unlawfully, purposely, and with malice aforethought, did strike, penetrate and wound him, the said James P. Hermes, in and upon the anterior surface of the thigh, breaking the bone of the upper leg of the said James P. Hermes; and with one of said bullets aforesaid, discharged from said gun aforesaid, by the said Robert B. Brown, then and there, wilfully, unlawfully, purposely, and with malice aforethought, did strike, penetrate, and wound him,
39 the said James P. Hermes, in and upon the left side of the chest coursing under the skin and lodging on the point of the left shoulder of the said James P. Hermes, and with one of said bullets aforesaid, discharged from said gun aforesaid, by the said Robert B. Brown, then and there wilfully, unlawfully, purposely, and with malice aforethought, did strike, penetrate and wound him, the said James P. Hermes, in and upon the left side of the chest,

coursing under the skin and lodging under the left armpit of the said James P. Hermes and with one of said bullets aforesaid, discharged from said gun as aforesaid, by the said Robert B. Brown, then and there wilfully, unlawfully, purposely, and with malice aforethought, did strike, penetrate and wound him, the said James P. Hermes, in and upon the chest about one inch to the left of the breast bone and between the fifth and sixth ribs, tearing a hole in the thoracic aorta of the said James P. Hermes; the said bullets aforesaid inflicting upon him, the said James P. Hermes, wounds, of which said wounds so inflicted as aforesaid, on the said lot, tract and parcel of land hereinafore referred to, as aforesaid, the said James P. Hermes did then and there die.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do further say and charge, that upon the day aforesaid, at the place aforesaid, on the said land acquired by the United States of America for its exclusive use, as aforesaid, with the said deadly weapon, and in the manner and form aforesaid, and used as aforesaid, the said Robert B. Brown did unlawfully, wilfully, purposely, and with his malice aforethought, kill and murder the said James P. Hermes, a human being, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the United States of America.

F. W. FRELS,

Foreman of the Grand Jury.

JNO. E. GREEN, Jr.,

United States Attorney Southern District of Texas.

40 Indorsed:—No. 74, United States District Court, Southern District of Texas, Corpus Christi Division. The United States of America vs. Robert B. Brown, Indictment. Murder committed on land acquired for exclusive use of the United States Vio. Secs. 272 and 275 Penal Code 1910. A True Bill. F. W. Frels, Foreman. Filed this 29th day of May, A. D. 1917. L. C. Masterson, Clerk. By J. L. Sexton, Deputy.

In the District Court of the United States for the Southern District of Texas, at Corpus Christi.

I, L. C. Masterson, Clerk of the District Court of the United States for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of The Indictment in Cause No. 74, on the Criminal Docket of said Court entitled The United States of America vs. Robert B. Brown, as the same appears on file in my office.

To certify which, witness my hand and seal of said Court, at Corpus Christi, in said District, this the 2nd day of January, A. D. 1918.

L. C. MASTERSON,

Clerk U. S. District Court, Southern District of Texas.

[SEAL.]

By J. A. MOUNT,

Deputy.

Indorsed:—No. 74 D. Cr. United States District Court Southern District of Texas. The United States vs. Robert B. Brown. Copy of Indictment.

Copy of Indictment No. 82, omitted from the printed record, said Indictment being heretofore printed at page 5.

* * * * *

41

Monday May 28, 1917.

Be it Remembered that at a Regular Term of the District Court of the United States for the Southern District of Texas, begun and held at the Courtrooms of said Court in the City of Corpus Christi, Texas, on Monday, the 28th day of May, A. D. 1917, it being the Fourth Monday of said month.

Present:

Hon. W. T. Burns, Judge presiding,
Jno E. Green, Jr. U. S. Attorney,
J. A. Herring, U. S. Marshal, and
L. C. Masterson, Clerk, by J. L. Sexton, Deputy.

And thereupon the Court being opened in due form by order of the Judge, the following proceedings were had, to-wit:

Ordered that Court adjourn until to-morrow morning at 10 o'clock

Tuesday, May 29th, 1917.

Court met pursuant to adjournment.

Present:

Hon. W. T. Burns, Judge presiding,
Jno. E. Green, Jr. U. S. Attorney,
J. A. Herring, U. S. Marshal, and
L. C. Masterson, Clerk, by J. L. Sexton, Deputy.

And thereupon the Court being opened in due form by order of the Judge, the following proceedings were had, to-wit:

The Grand Jury this day came into Court a quorum thereof being present, and in open Court presented the following Bill of Indictment, to-wit:

42

D. Cr., No. 74.

THE UNITED STATES

VS.

ROBERT B. BROWN.

Charge: Murder committed on land acquired for exclusive use of the U. S. Vio. Secs. 272 and 275 P. C. 1910.

Which said Indictment is ordered filed and entered upon the Criminal Docket of this Court.

D. Cr., No. 74.

THE UNITED STATES

VS.

ROBERT B. BROWN.

On this 29th day of May, A. D. 1917, came on to be heard defendant's motion to require a special session of the Grand Jury at Beeville and to restrain the Grand Jury from Finding a Bill in Nueces County; and the United States appeared by Jno. E. Green, Jr., United States Attorney, and Robert B. Brown, appeared in person and by his attorneys, Jas. R. Dougherty, and after hearing said motion; It is ordered by the Court that the same be and is hereby in all things overruled. To which the defendant then and there in open Court excepted.

D. Cr., No. 74.

THE UNITED STATES

VS.

ROBERT B. BROWN.

It appearing to the Court that an Indictment was this day returned in open Court, charging the defendant Robert B. Brown with murder committed on land acquired for exclusive use of the United States, Viol. of Secs. 272 and 275 Penal Code of 1910. It is ordered that the clerk issue a certified copy of said indictment under the seal of this Court for service on said defendant, together with a writ commanding to serve said copy upon him.

43

D. Cr., No. 74.

THE UNITED STATES

VS.

ROBERT B. BROWN.

On this 29th day of May, A. D. 1917, came on to be heard defendant's motion to change venue to Bee County, and the United States appeared by Jno. E. Green, Jr. U. S. Attorney, and Robert B. Brown appeared in person and by his attorney, Jas. R. Dougherty, and after hearing said motion, it is ordered by the Court that the same be and it is hereby granted.

D. Cr., No. 74.

THE UNITED STATES

vs.

ROBERT B. BROWN.

Ordered that this case be set for the First Monday in July, 1917, at Beeville, by oral agreement of counsel.

Monday, January 7th, 1918.

Be it remembered that at a Regular Term of the District Court of the United States in and for the Southern District of Texas, begun and held at the Court-rooms of said Court in the City of Corpus Christi, Texas, on Monday January 7th, A. D. 1918, it being the First Monday of said month.

Present:

Hon. Wm. B. Sheppard, Judge presiding,
Jno. E. Green, Jr., U. S. Attorney,
D. E. Simmons, Ass't U. S. Attorney,
J. A. Herring, U. S. Marshal, and
L. C. Masterson, Clerk.

And thereupon the Court being opened in due form by order of the Judge, the following proceedings were had, to-wit:

Ordered that Court adjourn until tomorrow morning at 10 o'clock

44 Tuesday, January 8th, 1918.

Court met pursuant to adjournment:

Present:

Hon. Wm. B. Sheppard, Judge presiding,
Jno. E. Green, Jr., U. S. Attorney,
D. E. Simmons, Ass't U. S. Attorney,
J. A. Herring, U. S. Marshal, and
L. C. Masterson, Clerk.

And thereupon the Court being opened in due form by order of the Judge, the following proceedings were had, to-wit:

No. 74, D. Cr.

THE UNITED STATES

vs.

ROBERT B. BROWN.

On this day came the United States Attorney and in open Court moved the Court to enter a Nolle Prosequere in the above entitled and

numbered cause; whereupon said motion was granted by the Court and a Nolle prosequere entered accordingly, and the case dismissed.

In the District Court of the United States for the Southern District of Texas, at Corpus Christi.

I, L. C. Masterson, Clerk of the District Court of the United States for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of all orders entered upon the Minutes of the Court, in Cause No. 74, on the Criminal Docket of said Cause, entitled The United States vs. Robert B. Brown, as the same now appears on file and of record in my office.

To certify which witness my hand and seal of said Court at Corpus Christi, in said District, this the 8th day of January, A. D. 1918.

L. C. MASTERSON,

*Clerk U. S. District Court, Southern
District of Texas,*

[SEAL.]

By J. A. MOUNT,
Deputy.

45 And thereupon the United States, through its district attorney, filed and presented to the Court its replication to said Motion and Plea in Abatement, in words and substance as follows:

"In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

D. Cr., 82.

THE UNITED STATES

vs.

ROBERT B. BROWN.

Comes now the United States, by its attorney, Jno. E. Green, Jr., and by way of replication to the motion of defendant, Robert B. Brown filed in this cause represents to the Court that while the order of May 29, 1917, directing that the motion of defendant for a change of venue be granted, it did not direct the transfer of the case of the United States vs. Robert B. Brown Dr. Cr. No. 74 to Beeville; that no order directing the transfer of said case was ever entered; that none of the papers in said case were ever directed by the Court to be transferred to Beeville; and they were in fact never so transferred; that in fact no order was ever entered directing the transfer of the case to Bee County, and that the Court at no time manifested any intention to enter such order, but on the contrary indicated that such an order would not be entered, and that by direction of the Court your attorney advised Honorable James R. Dougherty in a letter dated

August 31, 1917, that Judge Burns expected to try the case at Corpus Christi on the first Monday in January, 1918, a copy of this letter being attached hereto and marked "Exhibit A".

Wherefore, the plaintiff, the United States of America, prays that the said motion of the defendant Robert B. Brown be not granted.

Respectfully submitted,

JNO. E. GREEN, JR.,

United States Attorney Southern District of Texas.

46 Subscribed and sworn to by Jno. E. Green, Jr., before me this Jan'y 11th, 1918.

L. C. MASTERSON,

Clerk.

By J. A. MOUNT,

Deputy.

Indorsed: Plaintiff's Replication to Motion and Plea in Abatement of Defendant. Filed Jan'y 11, 1918.

And to such replication of the United States the defendant presented the following rejoinder:

"The defendant, Robt. B. Brown, through his attorney, answering the reply of the District Attorney, to the plea in abatement filed in cause number eighty-two, says, that the late Honorable Waller T. Burns, did by letter of date June 19th, 1917, which is now tendered to the Court, write to defendant's counsel, J. R. Dougherty, that he would at some later date determine whether the term of the Court for the trial of defendant should be held in the town of Beeville, or not. That by said letter he advised said attorney, that in the event the Court should conclude to hear the case at Corpus Christi, that it would be necessary to vacate the order transferring the same to Bee County.

"That this defendant being uncertain as to where the said cause would be tried; in reply to said letter, on the 16th day of August 1917, wrote to request more definite information, through his attorney, J. R. Dougherty. That in letter of August 31st, 1917, which is now tendered to the Court, as part of this reply, written by Mr. John E. Green, attorney for plaintiff, to attorney for defendant, and referred to in plaintiff's answer to this motion, there was nothing definite to advise defendant as to what course the Government would pursue and all he could gather therefrom was that Judge Burns indicated to the United States Attorney, that he expected to try the case at Corpus Christi, on the first Monday in January, and this defendant could not determine positively therefrom where this cause was to be tried, and this defendant could not consider said

47 letter as a vacation of the order of the said Court, requiring the case to be tried in the County of Bee. And this defendant says that said order to vacate, which the Honorable Waller T. Burns declared necessary has never been entered, and the cause still stands for trial in Bee County, according to said order."

Attached to said rejoinder of defendant are the following three letters, marked respectively One, Two and Three.

Exhibit Two, letter from Judge Waller T. Burns to J. R. Dougherty, counsel for the defendant, is as follows:

United States Courts, Southern District of Texas.

Waller T. Burns, U. S. District Judge.

Galveston, Texas, June 19, 1917.

Hon. James R. Dougherty,
Attorney at Law,
Beeville, Texas.

DEAR MR. DOUGHERTY:

The Department of Justice expresses the opinion that your Client, Mr. Brown, is not entitled to process to be served at the expense of the Government, unless you can avail yourself of section 878 of the revised Statutes.

This is to say, for the time being, that you ask for no process for the reason that I do not now expect to hold a Special Term at Beeville on the first Monday in July. Whether a special term will be held there later is a matter yet to be determined by the writer. By reason of the inadequate hotel accommodations, it occurs to me that Beeville does not offer any convenience, for either Court or Jury. As a result of some inquiry, I had concluded to carry down a tent and use some part of your town as a camp site during the trial of the case.

48 I will endeavor either to arrange a special term some time this Fall, or else, will try the case at Corpus Christi at the next regular term, which is the first Monday in January. The jurors and witnesses can be made comfortable at Corpus Christi and I have no assurance that they can get accommodations of any kind at Beeville.

For these reasons, the probabilities are that the case will be heard at the Corpus Christi term, in which last named event it will be necessary to vacate the order transferring the case to Bee County.

I am, very truly yours,
(Signed)

W. T. BURNS,
Mek. Judge.

Filed 18 of Jan., 1918.

L. C. MASTERSON,
Clerk,
By J. A. MOUNT,
Deputy.

Exhibit Two, letter written by James R. Dougherty, counsel for the Defendant, to Judge Waller T. Burns, is as follows:

8/16/17.

Hon. Waller T. Burns,
Houston, Texas.

DEAR JUDGE:

I am in this attitude in regard to the case of the United States vs. R. B. Brown: Since I am not advised definitely where and when the case will be tried, I am unable to have process issued for the witnesses for the defendant, though I have made deposit with the clerk for the purpose. This would not be important were it not for the further fact that a number of witnesses are being drafted into the service and I want to have process served upon them before they get to a place beyond our local jurisdiction. I gathered from your letter that you probably intended to try the case in Corpus Christi at the January Term, but since you did not positively say so under the circumstances, I wish you would advise me as soon as you conveniently can, where and when the case will be tried in order that I may get service upon all witnesses for the defendant at once.

Very sincerely yours,

JRD/GK.

Filed 18 day of Jany., 1918.

EXHIBIT FIFTEEN.

Letter from John E. Green, counsel for the Government, to James R. Dougherty, counsel for the Defendant, is as follows:

Houston, Texas, August 31, 1917.

Mr. James L. Dougherty, Attorney at Law,
First National Bank Bldg.,
Beeville, Texas.

DEAR SIR:

Judge Burns has spoken to me with reference to your letter August 16th, 1917, in regard to the case of United States vs. Brown. The Judge had indicated that he expects to try this case at Corpus Christi on the first Monday in January, 1918.

Respectfully,

(Signed)

JNO. E. GREEN, JR.,
United States Attorney.

j e g-o.

All of which letters were read to the Court.

Mr. Green: Your Honor, there is just one additional matter that escaped my attention on the first reading by counsel of his plea in abatement and motion; that if what it is, is it not?

Mr. Dougherty: Yes, we so consider it.

Mr. Green: That was this, that on the occasion of entering the nolle prosequi, I merely asked that the defendant be held to wait the action of the grand jury. He states that I asked that he be held until another indictment could be returned. Mr. Dougherty, if you will put that in the motion it will express the matter correctly; it was just to wait their action; I merely asked that he be held to wait the action of the grand jury.

Mr. Dougherty: Very good, Mr. Green.

Mr. Green: The letter of August 31st, which I wrote, was directed by Judge Burns, and was a reply to Mr. Dougherty's letter of date August, 16th, 1917.

After the foregoing motion and plea in abatement, together with the exhibits attached thereto, and the foregoing statements and testimony, and argument of counsel set out above were all introduced and heard, and argument for and against said motion and plea in abatement were considered, the Court overruled the said motion and plea in abatement, and the defendant then and there in open Court promptly excepted to the action of the Court in so overruling the Motion and Plea in Abatement, and the court then and there allowed the same.

Bill of Exceptions No. II.

Be it remembered, that as soon as the Plea in Abatement above mentioned and set out was overruled by the Court the defendant, in due order of pleading, before any other plea was presented or entered, and before any announcement, and before the above cause was called for trial, filed and presented in open Court his motion to have the cause tried in the County of Bee, State of Texas; said motion being in words and substance as follows:

In the United States District Court for the Southern District of Texas, Corpus Christi Division.

No. 82, D. Cr.

UNITED STATES OF AMERICA

vs.

ROBERT B. BROWN.

To the Hon. District Court for the Southern District of Texas:

Now comes Robert B. Brown, defendant herein, and not waiving any pleas or motions by him heretofore filed, but expressly insisting

upon the same, represents to the Court that by Indictment filed in the above numbered and styled cause he is charged with the offense of murder alleged to have been committed within the County of Bee and State of Texas; that said offense is punishable by death. This defendant says that, as is required by Section 40 of the Judicial Code, he has the right to be tried in the County of Bee and State of Texas, and he prays this Court to order that the trial of this cause be held within said County of Bee and State of Texas.

This defendant says that said trial may be had in the County of Bee, State of Texas, without great inconvenience.

ROBT. B. BROWN,

Defendant.

DOUGHERTY & DOUGHERTY,

G. R. SCOTT,

BOONE & POPE,

H. S. BONHAM &

JAMES F. ODEM,

Attorneys for Defendant, Robert B. Brown.

Indorsed: Motion to have cause tried in Bee County, Texas.
Filed Jany. 11, 1918.

52 The plaintiff filed the following replication:

In the District Court of the United States for the Southern District
of Texas, Corpus Christi Div.

D. Cr., 82.

THE UNITED STATES

vs.

ROBERT B. BROWN.

Comes now the United States, by its attorney, Jno. E. Green, Jr., and by way of replication to the motion this day filed by Robert B. Brown, acting through his attorneys, Dougherty & Dougherty, asking that a change of venue to Bee County be granted in the above styled and numbered cause, represents to the Court:

1.

That the Government has summoned a large number of witnesses which are now in attendance upon this Court for the purpose of giving testimony in behalf of the Government.

2.

That counsel for the defendant Robert B. Brown was advised that R. B. Brown would be tried in Corpus Christi as evidenced by the letter from Mr. James R. Dougherty addressed to Honorable Waller

T. Burns, in Houston, said letter being dated August 16, 1917, and a copy of which is attached hereto marked "Exhibit A," and by the letter from your attorney herein dated August 31, 1917, addressed to Mr. James R. Dougherty, at Beeville, a copy of which is attached hereto marked "Exhibit B."

3.

That the City of Beeville, in Bee County, is in the Corpus Christi Division of the Southern District of Texas, and that Corpus Christi is the regularly appointed place of holding Court in this division.

53

4.

That a special term of Court could not be held at Beeville, Texas, without great inconvenience for the following reasons, to-wit:

(a). That there is no federal building in the City of Beeville, and that it will be necessary for the United States either to rent a building and equip same or else negotiate with the county officers for the use of the county Court house at Beeville; that if the county Court house is engaged there will be no adequate office space for the United States Judge, the Clerk, the Marshal, or the attorney.

(b). That the City of Beeville is a small place without proper facilities to accommodate the large number of Court officials, witnesses and jurors that will necessarily be in attendance on Court at Beeville.

(c). That owing to the recent statutes enacted by Congress of the United States, with the view of aiding the President of the United States in the prosecution of the war in which this country is now engaged, the duties of the district attorney have multiplied, and that it would be a serious inconvenience to the United States, and hamper the administration of the laws and the enforcement of the recent statutes in the Southern District of Texas to require the district attorney to prepare for a special term of Court at Beeville.

(d). That there are now in attendance upon this Court more than fifty witnesses subpoenaed and brought to Corpus Christi at the Government's expense for the purpose of testifying in the case of the United States vs. Robert B. Brown.

(e). That among the material witnesses which the Government expects to use are Doctor J. H. Lander, formerly of Beeville, Texas, *not* now attached to the Camp Hospital of the United States Army at Del Rio, Texas, with the rank of Captain, and Doctor Orville Egbert, now assigned with rank of Lieutenant to Fort Clark, a military fort of the United States; that Doctor Lander and Doctor Egbert performed an autopsy on the deceased James P. Hermes, and that the Government expects to prove by them the location and nature of the wounds alleged to have been inflicted by the defendant, and also expects to prove by said witnesses the cause

of death in this case; that there is no other witness by whom these facts can be proved; that your attorney is informed and verily believes that the United States troops to which these witnesses are now attached may at an early date be designated for foreign service, and that the Government would therefore be greatly inconvenienced inasmuch as it would be a great inconvenience, if not an impossibility, to have the witnesses, Doctor J. H. Lander and Doctor Orville Egbert, returned to this jurisdiction to give testimony in this case.

(f). That Honorable Waller T. Burns, former Judge of the United States District Court for this District, died November 17, 1917, and no successor for him has been appointed up to this time; that the office of Judge for this District is being temporarily filled from time to time by the designation of Judges from other districts in the circuit; that the time which these judges can give to matters in the Southern District of Texas is limited, and that for this reason at this time it would be a great inconvenience to hold a special term in Beeville.

5.

It is further represented that the homicide for which the defendant Robert B. Brown stands indicted is not alleged to have occurred in the body of Bee County, but is specifically alleged to have occurred on a certain lot, tract and parcel of land under the
55 sole and exclusive jurisdiction of the United States of America, and out of the jurisdiction of any particular state, it being particularly alleged that exclusive jurisdiction had not been ceded to the United States of America by the State of Texas long prior to the commission of the offense, so that while the site acquired by the United States of America is within the geographical limits of Beeville, Bee County, Texas, it having been acquired by the United States for public uses, and jurisdiction having been specifically ceded by the State of Texas, as prescribed by statute, the said lot, tract and parcel of land where the offense is alleged to have been committed is not within the body of the County of Bee.

Respectfully submitted,

JNO. E. GREEN, JR.,

United States Attorney, Southern District of Texas.

Subscribed and sworn to by Jno. E. Green, Jr., this Jany. 11, 1918.

[SEAL.]

L. C. MASTERSON,

Clerk,

By J. A. MOUNT,

Deputy.

Beeville, Texas, 8/16/17.

Hon. Waller T. Burns,
Houston, Texas.

DEAR JUDGE:

I am in this attitude in regard to the case of The United States vs. R. B. Brown: Since am not advised definitely when and where the case will be tried, I am unable to have process issued for the witnesses for the defendant, though I have made deposit with the clerk for the purpose. This would not be important were it not for the further fact that a number of witnesses are being drafted in the service, and I want to have process served upon them before they get to a place beyond our local jurisdiction. I gathered from your letter that you probably intended to try the case in Corpus Christi at the January Term, but since you did not positively say so, 56 under the circumstances I wish you would advise me as soon as you conveniently can where and when the case will be tried, in order that I may get service upon all witnesses for the defendant at once.

Very sincerely yours,
(Sd.)

JAMES R. DOUGHERTY.

jed-gk.

(Copy.)

Houston, Texas, August 31, 1917.

Hon. James L. Dougherty, Attorney at Law,
First National Bank Bldg.,
Beeville, Texas.

DEAR SIR:

Judge Burns has explained to me with reference to your letter of August 16th, 1917, in regard to the case of United States vs. R. B. Brown.

The Judge has indicated that he expects to try this case at Corpus Christi on the first Monday in January, 1918.

Respectfully,
(Sd.)

JNO. E. GREEN, JR.,
United States Attorney.

jeg-o.

Plaintiff's Replication being indorsed as follows: Filed Jany. 11, 1918.

57 In the District Court of the United States for the Southern District of Texas, Corpus Christi Div.

D. Cr., 82.

THE UNITED STATES

VS.

ROBERT B. BROWN.

To the Honorable William B. Sheppard, Judge of said Court:

Comes now the defendant and replying to the Answer of the United States herein to the motion of this defendant, to require the trial of this case in Bee County, and says:

First.

That the place where the offense is alleged to have been committed lies within the County of Bee, and State of Texas, and within the purview of Section 40 of the Judicial Code.

Second.

That the late Honorable Waller T. Burns did, by a letter of date June 19th, 1917, which is hereto attached, write to defendant's counsel, James R. Dougherty, that he would at some later date determine whether the term of the Court for the trial of this defendant should be held in the Town of Beeville or not. That by said letter he advised said attorney that in the event the Court should conclude to hear the case at Corpus Christi that it would be necessary to vacate the order transferring the case to Bee County.

That this defendant being uncertain as to whether the case would be tried in reply to said letter of the Honorable Waller T. Burns, on the 16th of August, 1917, wrote to request more definite information through his attorney.

That in letter of date August 31st, 1917, which is hereto attached, written by Mr. John E. Greene, Jr., Attorney for the plaintiff to the attorney for the defendant, there was nothing definite therein to advise defendant as to what course the Government would actually pursue. That all that could be gathered therefrom was that Judge Burns had indicated to the United States District Attorney that he expected to try the case at Corpus Christi, on the first Monday in January. That this defendant could not determine therefrom that there would necessarily be, nor did such letter amount to, a vacation of the order of this Court requiring the case to be tried in the County of Bee, and this defendant says that such order to vacate, which was declared necessary by the Honorable Waller T. Burns, has never been entered, and the case still stands for trial in Bee County according to said order.

Third.

Replying to the Fourth paragraph of plaintiff's answer to defendant's motion, this defendant denies that the order was merely interlocutory, but says, that jurisdiction over the case thereby vested in a term and special division of the Court to be held in Bee County under said order, and that the term, having expired at which the order was entered this Court has no further control thereof.

Wherefore, the defendant prays that plaintiff's prayer that the order entered in the case of date, May 29th, 1917, be vacated be denied.

Fourth.

And answering the Sixth paragraph of plaintiff's answer to defendant's motion, on the question of inconvenience or not, has already been determined by this Court at a prior term which has now expired and cannot be re-opened.

Answering Subdivision A of Paragraph Sixth, this defendant says, that while there is no Federal Building in the Town of Beeville, that there is a large county and district Court house recently erected at a cost of about \$75,000.00 fully and thoroughly equipped with modern furniture and conveniences, and that the county officials of Bee County have agreed and consented to the allowance for the use thereof by the United States for the purpose of this trial, and that there will be ample office space for the United States Judge, Clerk, Marshal and Attorney, and that there are a number of rooms furnished within the Court house, adjacent to the several Court rooms that are especially adapted to the purpose.

Answering Subdivision B, defendant says that the Town of Beeville is a place of about four or five thousand people, and has ample facilities to accommodate all Court officials and jurors that will necessarily be in attendance on the Court at Beeville. That practically every one of the numerous witnesses in the case reside in Beeville, and it would materially enhance their convenience if the case be there tried.

That there is ample accommodations for the jurors in the way of hotels, boarding houses and restaurants.

And answering Subdivision C of said Paragraph Sixth, Defendant says that the trial of this case in the town of Beeville will not take longer than it will in any other place in the District, and take no more time of the Dist. Atty., in fact this defendant believes the trial will be expedited by having it take place where the offense occurred as it will be far more convenient for the witnesses than at any other place.

That, answering Subdivision E of said paragraph, defendant says, that in so far as the testimony of Dr. J. H. Lander and Dr. Egbert is concerned, that this defendant will agree that their depositions may be taken, either orally or by question and answer, and that such deposition may be used in the event that at the time of the

trial of the case said witnesses shall have gone abroad as stated in subdivision E of Paragraph Sixth.

Summarizing in reply to Plaintiff's summary, defendant says that the lot on which the homicide is alleged to have occurred is within the County of Bee and Section 40 has application.

60 Second. That the trial of this case can be had without great inconvenience, and

Third. This defendant says that these matters have already been adjudicated and should not now be re-opened by this Court.

Respectfully submitted,

DOUGHERTY & DOUGHERTY,
G. R. SCOTT,
BOONE & POPE,
H. S. DONHAM &
J. F. ODEM.

Attorneys for Defendant.

Indorsed: Deft's Replication to Answer of U. S. to Motion of Deft. to require trial of this case in Bee County. Filed Jan'y. 11, 1918.

Upon which motion of the defendant, to have the cause tried in the County of Bee, testimony was presented to the Court as follows. On the motion by the defendant, the witness, JOE THORNTON, was called, who testified as follows:

Direct examination:

My name is Joseph Thornton; I am sheriff of Bee County; this is my eighth year in that office. The body of the witnesses, both for the Government and for the defendant in this case reside in the Town of Beeville, in the County of Bee. I am acquainted with the capacity of that town, for the entertainment of strangers, in the way of boarding houses, hotels, and restaurants; there are some six or seven rooming houses and a hotel, which entertain transient people; some of the rooming houses also furnish meals. They have a hotel there which has twenty-eight rooms, twenty-five of which are guest-rooms, that is, including the annex; the service given to the guests there is reasonably good, considering the size of the town, the town was one of five thousand people in the year
61 1910. I believe that two of the rooming houses furnish meals, the rest have just rooms and beds; the two places which furnish meals are Mrs. Tom Simmons' and Mrs. Ellis.

Q. How many rooms are there at Mrs. Simmons' place?

A. I got a notation of that night before last, when I was at home; I called up each party——

Mr. Green: We object to this statement unless he knows himself; that would be hearsay.

Court: You did not verify it by personal inspection?

Witness: No, sir.

Witness (Continuing):

I am familiar with Mrs. Simmons' boarding house; I know that she has a two story house, and two cottages in the same yard, or she did have a while back, and I know of no change that has been made; the two story house has about ten guest rooms, and they furnish meals there. One other place which furnishes meals is Mrs. Ellis'; then there is the old Levy house, Mrs. Lieberman, at the Old Parr House, who also furnish meals; I have been in the Levy house several times, I think they have five rooms there; the Lieberman house is a two story house, and from my recollection I should think they have some six or eight rooms there; Mrs. Green has a house, just across the street from the Old Parr house, which is used as a boarding house, she has ten rooms, but does not furnish meals; there is also the "Travelers Home," kept by Mrs. Trevellian, with seven or eight rooms, but no board; Mrs. Diack has a rooming house, with nine bedrooms for guests, outside of her family; I have in mind other rooming houses kept by Mrs. Geo. Frells, Mrs. Tom
62 Simmons, Mrs. Betts, Mrs. L. Green, Mrs. Lieberman, and Mrs. Trevellian, some of which I have mentioned before.

Q. How about Mrs. Oppett's?

A. I called up Mrs. Oppett—

Mr. Green: I renew my objection.

Witness (Continuing):

I do not know about Mrs. Oppett's house from my own knowledge. In the aggregate there are seventy-five to eighty-five rooms, including the hotel, I could not say exactly how many people they would accommodate. There are accommodations for the jury in the Court house, we have twenty-six new iron beds, with new mattresses, new everything, on the third floor of the Court house, Southeastern exposure, and it is up to date as any small town. I am also acquainted with the Bond restaurant there, it is as good as you will find in any small town in South Texas, it is sanitary and has good service; I could not say exactly how many people the restaurant could accommodate, but I can state that we have had some cases in Beeville with one hundred and forty-some-odd veniremen, and from thirty-five to fifty or seventy-five witnesses; we had a fair there last fall, and we accommodated a good many people, I could not say exactly the number; the greater part of these witnesses and veniremen that I speak of came from out of town.

Q. Mr. Thornton, I will ask you, in your judgment, from your familiarity as sheriff with the accommodation of crowds, whether in your judgment they would receive adequate and reasonable service there, should a session of this Court be held in Beeville?

Mr. Green: Your Honor, we object, it is not for the Sheriff to express his opinion; it is for him to state the facts, and for the Court to determine.

63 Court: His opinion is not material.

Witness (Continuing) :

In the Court house there are plenty of offices, convenient to the Court room, which could be used by the Judge, the District Attorney, and the Clerk of the Court; I think I have authority under the law to use the Court room; I have charge of it.

Q. Are you all willing that the United States, in the event that a term of the Court should be held in Beeville, to try this case, that the United States Government should have the use of the Court room and offices, without charge to the Government?

Mr. Green: Your Honor, I take the position that this officer has no authority to make that tender, that the Court house is under the authority of the Commissioners. The Commissioners' Court has charge of the Court house.

Mr. Dougherty: Our statute specially provides that the sheriff shall have charge of it.

Court: So far as he is concerned, he can state his willingness.

Q. Do you know whether or not the District Judge has expressed his willingness?

Mr. Green: I object, that would be hearsay.

Court: Yes, that would be going into rumors.

64 Witness (Continuing) :

As custodian of the Court house under the law, I am willing that the United States may occupy this Court room, and the various offices connected therewith; I will do everything I can to aid them and help them out.

Cross-examination:

There is snow on the ground this morning, and it is pretty cool; Beeville is a little to the North of here, and it is reasonable to suppose that it is about as cold there. These places which I have been speaking of are frame buildings, they are heated by stoves, I do not believe there is any steam heat there. I do not know that Beeville is notorious for its poor accommodations, nor that the traveling men shun it; nor that they avoid staying over Sunday there; I do not travel around much.

Redirect examination:

I consider Mr. Robt. B. Brown as a man of ordinary means; I mean by that a common working man.

Recross-examination:

Q. Do you know as a matter of fact that he has a Brother of considerable means who is assisting him in this case?

Mr. Dougherty: We object, it is immaterial.

Court: If the other is material, this is material. I do not think that is very material gentlemen; one way or the other.

Mr. Green: I would like for the record to show that the defendant is here, and his witnesses in attendance on Court.

65 Judge TROY, called as a witness by defendant, but cannot be found.

Mr. Dougherty: We expect to prove by this witness, Your Honor, that he, as Judge of the Commissioner's Court of Bee County will extend his invitation and consent to the use by the Government, and the District Court, of the Court House at Beeville, during the trial of this case.

Mr. Green: I would object to that as immaterial, because as Judge of the Commissioner's Court, he would have to have authority by action of the Court to make this offer, and he has not, up to this time, made such a tender to the Government.

Court: Who is the custodian by statute?

Mr. Dougherty: The Sheriff, sir.

Court: He has complete custody and control of the Court House?

Mr. Dougherty: Yes, sir;—

Mr. Green: He has such custody, but my position is that he would have to have other authority for the use of the Court House by outsiders.

Mr. Dougherty: The statute provides that he shall have custody.

66 Mr. Green: In reply to that testimony I would like for the record to show that this indictment has been returned two days, and up to this hour no tender has been received by the Government from any authorized person; or any intimation that it would be agreeable for the Government to take those facilities of the Court House.

Mr. Dougherty: I am able to secure the witness, he is here in town.

Mr. Green: I am informed last night that the County Judge went home.

(Bystanders consulted, and it appears that Judge Troy is not in Corpus Christi).

Mr. Dougherty: We have no other witness, Your Honor.

Defendant rests on Motion.

DAN TROY, being called, testified on behalf of the Government, as follows:

Direct examination:

My name is Dan Troy, I live in the City of Beeville, in Bee County. I have held official positions in that county as follows:—District and County Clerk for eleven years, and then County Clerk for six years. I am acquainted with the facilities in the present court house in Beeville; the County court house. From my knowledge of that court house, and its present occupancy, I do not think that it could adequately accommodate this Court, under present conditions for the

trial of this case; I do not think that the arrangement of the building and its present occupancy would permit of its being suitably arranged for the session of this Court. I am acquainted with the hotel accommodations in Beeville; I have traveled some and been in other towns in this state and around the country.

Q. State to the Court whether you would consider them good, as good as the average town of that size?

Mr. Dougherty: We object, the question calls for the opinion of the witness.

Q. Just state to the Court whether the conditions there are good or not?

Mr. Dougherty: My objection is that it is his opinion, he should state facts, and it should be determined from that by the Court, upon these facts.

Court: He is a public officer, and makes known the fact that the court house is at present occupied, and what is asked for is a conclusion from his knowledge of the circumstances. I will overrule the objection.

Witness (Continuing):

There are a few boarding houses and one hotel in Beeville; they are all frame buildings. I do not know the exact temperature outside this morning, but it is freezing.

Court: Is this an unusual temperature for this section?

Witness (Continuing):

This is very unusual for this section of the country, we have it occasionally, but not very often. I do not think that there are facilities in Beeville to take care of the court officials, any witnesses that might come from out of town, and the jurors, estimating their number at eighty-five; I do not think they could be made comfortable with these facilities, provided the Court were to go there for the trial of this case. The hotel and the rooming houses are all frame houses; they are not heated by steam; the rooming houses are all residences which have a surplus room or two, and take in people.

Cross-examination:

A large part of the witnesses in this case reside in Beeville. We have a dormitory with twenty-four beds in it, in the Court house, for the jurors. The District Court room there is larger than this one; so far as the Court room is concerned, we have an abundance of that. Adjoining the Court room are lavatories, and one office; there is just one office for the District Attorney and the Judge; there are two rooms there, but one is the Commissioner of the Court's room, and it is now occupied by some board, and is going to be for an indefinite time. There is one small office on the West. Between the District Court room and the County Court room there are two little rooms; one of them occupied by the board I speak of. The District Court

is off on circuit now, and does not meet in Beeville again until away along in Summer sometimes. There are Grand Jury rooms there on the next floor, which are now unoccupied. I was at the hotel in Beeville about a week or ten days ago; I got a fairly good meal. Charles Troy, the Judge, is not in Corpus Christi, he went home last night;—

Q. Well, Judge Troy, I will ask you, if the witnesses in this case are all residents, practically, of the town of Beeville, and after the selection of the jury up there, do you not think the town could accommodate the jury and the court officers; a dozen jurors, and the court officers?

Mr. Green: I think that question is incompetent, there will have to be a venire, before there can be a jury selected.

69 Court: He will have to predicate it upon the amount of men that will be required.

Witness (Continuing):

Among the jurors here are several from Bee County, and some from Beeville, among them Mr. Floyd, Mr. Thomas Lyons, and Mr. John Cole; Mr. Francis Miller is from Skidmore, immediately adjoining the town; those who have automobiles go back and forth between Skidmore and Beeville. A number of the jurors, as I have said are from Bee County, and a few of them from the town of Beeville.

Q. Mr. Troy, I will ask you that if fifty to seventy-five men were selected as jurors to attend Court up there, assuming that a part would be taken from Beeville, in the selection of a jury; with half a dozen officials of the Court: do you not think the town of Beeville, assuming that a reasonable number of them would come from Beeville, could handle them reasonably well?

Mr. Green: If he assumes that a "reasonable" number of them would come from Beeville, that does not give an accurate idea; the witness must understand that there would be many from other counties.

Witness (Continuing):

Assuming that there would be from 50 to 75 jurors called to attend upon the Court, and that Bee County, being within the district, its reasonable proportion of them would be summoned to serve; and that there would be some half dozen court officials; I do not think that even with the accommodations at the Court house, that is, the provisions for sleeping places for the jurors; and Bond's restaurant, that they could be furnished with reasonable accommodations during their stay there. We have plenty of facilities in so far as the
70 Court room is concerned; but otherwise I do not think we could accommodate them. I am acquainted with Bond's restaurant, it is as good a restaurant as there is at any place in South Texas, and has a reputation for very good eating. I do not know how many guest rooms there are in town; I should say that eighty-

five was an excessive number; it seems to me from my acquaintance with the town that there are not that many.

Q. If there are that many rooms you would say that the Court could be accommodated?

Mr. Green: I object, that is by way of argument.

Court: That is material.

Mr. Green: Do you sustain the objection?

Court: I will permit the answer.

Witness (Continuing):

If there are that many, that would probably take care of the Court and the attendants. The distance from Beeville to Corpus Christi is fifty-six miles by rail. The Court house is not heated at all now, we started in with steam heat, and it fell down, and it is now taken all to pieces, and we are waiting for some repairs from New York, and now we have no stoves whatsoever. It is true there are a few oil stoves scattered around the building; and there is a little bit of a coal stove in the District Court room; I had forgotten about that one; but the chimney goes out of the window, and when the wind comes from the North it makes the smoke all come back in the room. The District Court has just held a term there, but we did not have any
 71 very severe weather, and I think the Judge made it convenient during the two or three unpleasant days that we had, to have very little Court. The weather there is generally very mild; just occasionally we have cold snaps.

Mr. Green: I would like the record to show that the jurors drawn in this case would be from Aransas, Bee, Brooks, Duval, Jim Hogg, Jim Wells, Kleberg, Live Oak, Nueces, San Patricio, and Willacy counties; and further show that we have a heavy docket in Galveston, to be taken up immediately upon the conclusion of the term of Court here in Corpus Christi; following that, the Court begins in Houston on the 4th Monday in February, extending through the month of March. That the term of Court in Houston is through the month of March, until the middle of April; that at Laredo the Court convenes on the third Monday in April; and in Victoria on the first Monday in May; in Brownsville, the second Monday in May, and in Galveston the first Monday in June; (I overlooked that the next term in Corpus Christi would be the fourth Monday in May), and it would be quite inconvenient to hold the term of Court between any of these dates, on account of the large dockets at each of these places; the dockets having materially increased, due to the recent enactment of the so called "War statutes;" and that a delay until after the term of Court in June would be inconvenient to the Government, because it would prejudice the Government's case to delay that long.

Court: The Court considers this application on indictment eighty-two, and in view of the public business to be disposed of at the ensuing terms of Court, at Galveston, at Houston, and at the other places within the District, and the fact that there could not be a term of Court conveniently held at this place, Beeville, before July,

and that the witnesses for the Government are in part military men, who are material witnesses, and are subject to be dispatched
72 to foreign fields of war, and that the present session of the Court in Corpus Christi is about concluded except for the business of this trial, and the witnesses are all in attendance upon the Court at Corpus Christi, and a special venire is returned for the trial of this cause; it further appearing that the defendant is confined in jail, and the charge against him not admitting of his enlargement on bail.

The Court finds and ascertains from the testimony, and from facts within its judicial knowledge; that a special term could not be held at Beeville before July, without great inconvenience, and that the continuance of the case until such time would probably prejudice public interest.

Therefore, the motion to transfer the case to Beeville is overruled.

Mr. Dougherty: To which the defendant excepts.

Court: Very well, note the exception.

Bill of Exceptions No. III.

Be it remembered, That in due order of pleading, on the 11th day of January, A. D. 1918, in the above styled cause, the defendant filed in the Court and presented to the Court his motion to quash said Indictment in said Cause No. 82; said motion to quash being as follows, to-wit:

73 In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

No. 82, D. Cr.

UNITED STATES OF AMERICA

vs.

ROBERT B. BROWN.

To the Hon. Wm. B. Sheppard, Judge of said Court:

Now comes the defendant Robert B. Brown, and moves the Court to quash the Indictment herein returned against him, because:

1.

Said indictment charges this defendant with no offense against the laws of the United States,

Wherefore, this defendant respectfully moves the Court to quash said indictment, and that this defendant be dismissed.

Respectfully submitted,

DOUGHERTY & DOUGHERTY.

G. R. SCOTT,

BOONE & POPE.

H. S. BONHAM.

JAMES F. ODEM.

Said Indictment being set out in full at page 3, Bill of Exception No. 1, and is made part of this bill.

Thereupon the Court, having heard the motion to quash, and the argument thereon, overruled said motion, and to this action of the Court in so overruling and denying said motion the defendant then and there in open Court excepted, which exception was allowed.

74

Bill of Exceptions No. IV.

Be it remembered, That in said cause of United States of America vs. Robert B. Brown, after the various preliminary pleas and motions had been acted upon, the cause thereupon proceeded to trial, and the taking of the testimony, the jury being at the bar, and while the witness, John S. Fenner, witness for the Government, who had been sworn, was on the stand, upon examination by the Government, the following took place:

The Counsel for the Government asked the following question:

Q. I will ask you whether or not the ground that you surveyed there on that plat, as represented by your drawings there, is the same as called for in the deeds?

Mr. Dougherty: We object to the question, first because it is leading, second, because the deeds are themselves the best evidence of the location of the plot of land referred to.

Mr. Green: Which deeds I am now tendering you, and which I offer in evidence.

Mr. Dougherty: If your Honor please, we object to the introduction of the deeds, because their execution is not proven, either at Common Law, or under our statutes.

Here counsel argue questions as to the admissibility of deeds at length.

Court: Take up the instruments offered in evidence and the objections thereto seriatim.

75 Mr. Green: I want to offer the original deeds, and the certified copies which come from the records of Bee County. I offer first certified copy of deed from Ed. Swanton, and Caroline Swanton to the United States. I offer certified copy of deed from A. Praeger and Lizzie Praeger to the United States; the property having been conveyed part from one party, and part from another. (Marked Ex. No. 3 and No. 6 respectively.)

Mr. Dougherty: The defendant objects to the introduction in evidence of the deed from Ed. Swanton and Caroline Swanton to the United States, and to the certified copy, because it does not appear that the original instrument has been lost, or that they are unable to procure it, and there is no proof of the execution of the original instrument, of which said deed purports to be a copy, and the said certified copy has not been filed in the papers of this cause for the

period of three days, as required by statute, nor has any affidavit of the loss or inability to procure the original of said instrument been made by the party tendering this deed; nor has any notice been served upon the defendant as required by the statute, Article 3700 Rev. Stat. Texas, that the United States of America expected, or intended to offer said certified copy in evidence.

And, as to the instrument purporting to be a certified copy of a deed from A. Praeger and Lizzie Praeger to the United States, the defendant makes the same objection, as made to the preceding deed, and shows that he has not been served with any notice, of loss, or inability to procure the original, nor has said certified copy of deed been filed in the papers in this cause for the period required by statute, and both of said instruments purport to be only secondary evidence of the original, if they were executed.

Court: Read the statutes.

76 Here counsel read statutes to the Court, and argue- their applicability to the present case, at length.

Court: These certified copies appear to be authorized to be admitted in evidence, provided they have been filed three days, and notice thereof given, and affidavit of inability to produce the originals. Have these certified copies any indorsements upon them?

Mr. Dougherty. They do not appear to have been filed save for an indorsement, "Filed January 11th, 1918," which is signed by the Clerk. We have had no affidavit; no notice of intention to produce them in evidence; the three days contemplated by the statutes have not expired since the filing; just two days have passed since the deeds were filed according to the indorsement.

Court: Let us see the originals.

Mr. Green: These originals were filed on the 7th, the day we got here, and on the 8th I went back and asked the Clerk to file these in the other case.

Court: You attempted to comply with the statute, but you did not give the notice; I think however that the question of title is only incidental in this case.

Mr. Green: My position is that these are prima facie evidence of title.

Court: The cession is the main thing, if the Governor has given to the United States exclusive jurisdiction, then it must be presumed that it was done upon authority of law. I overrule the objection to the certified copies.

77 Mr. Dougherty: To which the defendant excepts.

The certified copy of the deed from Ed. Swanton and Caroline Swanton to the United States is as follows:

THE STATE OF TEXAS,
County of Bee:

Know all men by these Presents:

That we, Ed. Swanton and Caroline Swanton, husband and wife, of Hailey, Idaho, for and in consideration of the sum of Four Thou-

sand and Five Hundred Dollars (\$4,500.00) to us in hand paid by the United States of America, the receipt of which is hereby acknowledged, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said United States of America, all that certain lot or parcel of land, situated in the County of Bee and State of Texas, being a lot One Hundred (100) by One Hundred and Ten (110) feet, out of the northeast corner of Lot Number One (1) in Block Number Thirty-seven (37) in the original town of Beeville, the said lot hereby conveyed is described by metes and bounds as follows:

Beginning at the Northeast corner of said Lot Number One, at the intersection of St. Marys Street and Bowie Street,

Thence South $26^{\circ} 31'$ East with the western boundary of St. Marys Street one hundred feet to a stake in the northeastern boundary of said Block No. 37,

Thence South $63^{\circ} 31'$ West with the boundary of a tract conveyed by G. M. Fizer to Patterson & Kavanaugh, one hundred and ten (110) feet to the boundary of a lot conveyed by G. M. Fizer to A. Praeger,

Thence North $26^{\circ} 31'$ West, with said boundary of said Praeger lot one hundred feet to the west corner of the lot hereby conveyed, in the southern boundary of said Bowie Street,

78 Thence North $63^{\circ} 31'$ East with said boundary of Bowie Street, at one hundred and ten feet to the place of beginning.

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said United States of America, and its assigns forever, and we do hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said United States of America, and its assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands this 30th day of June, A. D. 1911.

ED. SWANTON,
CAROLINE SWANTON,

THE STATE OF IDAHO,
County of Blaine:

Before me, Leon Fuld, a Notary Public, in and for Blaine County, Idaho, on this day personally appeared Ed. Swanton, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 7th day of July, A. D. 1911.

[SEAL.]

LEON FULD,
*Notary Public, in and
for Blaine County, Idaho.*

THE STATE OF IDAHO,
County of Blaine:

Before me, Leon Fuld, a Notary Public in and for Blaine County, Idaho, on this day personally appeared Caroline Swanton, wife of Ed. Swanton, known to me to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said Caroline Swanton, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration herein expressed, and that she did not wish to retract it.

Given under my hand and seal of office, this 7th day of July, A. D. 1911.

[SEAL.]

LEON FULD,
Notary Public, in and
for Blaine County, Idaho.

STATE OF TEXAS,
County of Bee:

I, Dan Troy, County Clerk of said county do hereby certify that the foregoing deed, with its certificate of authentication, was filed for record in my office April 27th, 1912, at 10 o'clock A. M. and with his certificate of record, was duly recorded May 1st, 1912, in the deed records of said County, in Volume No. 50, page 559.

To certify which, witness my hand and official seal, at office, in Beeville, Texas, this May 1st, 1912.

[SEAL.]

DAN TROY,
County Clerk, Bee County, Texas.

THE STATE OF TEXAS,
County of Bee:

I, F. J. Malone, Clerk of the County Court of said County, hereby certify that the foregoing is a true and correct copy of a deed from Ed. Swanton and Caroline Swanton to The United States of America the same appears of record in Volume No. 55, page 559, of the deed records of Bee County, Texas.

Witness my hand and seal of office, this 26 day of May, 1917.

[SEAL.]

F. J. MALONE,
Clerk, County Court, Bee County, Texas.

Indorsed: Filed 11 day of Jany., 1918.

The certified copy of the deed from A. Praeger and Lizzie Praeger to the United States is as follows:

THE STATE OF TEXAS,
County of Bee:

Know all men by these Presents:

That we, A. Praeger and Lizzie Praeger, husband and wife, of the County of Bee, State of Texas, for and in consideration of the sum of Five Hundred (\$500.00) Dollars to us cash in hand paid by The United States of America, and other valuable considerations to us moving, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said The United States of America, all those two certain tracts or parcels of land, lying, being and situate in the County of Bee, in the State of Texas, and being a part of Colonial Grant, made by the State of Coahuila and Texas to Anna Burke, described as follows, to-wit:

First. A lot of land thirty (30) feet by one hundred (100) feet out of Block Number Thirty-seven (37) in the original Town of Beeville, described by metes and bounds as follows:

Beginning at a point on Bowie Street one hundred and ten (110) feet West of the Northeast corner of Block Number 37, of the original Town of Beeville, running south one hundred (100) feet parallel with St. Mary's Street,

Thence West Thirty (30) feet parallel with Bowie Street,

Thence North along an alley one hundred (100) feet to Bowie Street,

Thence East thirty (30) feet along Bowie Street to the place of beginning, and being the same property conveyed to A. Praeger by G. M. Fizer, by deed recorded in Volume "Q," on page 499, of the deed records of Bee County, Texas.

81 Second. A lot or parcel of land fifty (50) by one hundred and forty (140) feet out of said Block Number Thirty-seven (37) of the original Town of Beeville, described by metes and bounds as follows:

Beginning at a point on the eastern boundary line of said Block Number Thirty-seven (37) and on the western boundary line of St. Mary's Street, whence the northeast corner of said Block Number Thirty-seven bears North 26 31' West along said boundary line one hundred (100) feet,

Thence South 26 31' East along said boundary line fifty (50) feet,

Thence South 63 West one hundred and forty (140) feet to an alley,

Thence North 26 31' West with said alley fifty (50) feet,

Thence North 63 East one hundred and forty (140) feet to the place of beginning, and being the same property conveyed to A. Praeger by Thomas Tyson, and others, by deed recorded in Volume "F-2," on pages 415-416, of the Deed Records of Bee County, Texas.

To have and to hold the above described premises, together with

all and singular the rights and appurtenances thereto in anywise belonging, unto the said The United States of America, and its assigns forever, and we do hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend, all and singular, the said premises unto the said The United States of America, and its assigns, against every person whosoever lawfully claiming or to claim the same or any part thereof.

Witness our hands at Beeville, Texas, this the 10th day of August, A. D. 1911.

ALBERT PRAEGER,
LIZZIE PRAEGER.

82 THE STATE OF TEXAS,
County of Bee:

Before me, R. L. Cox, a Notary Public in and for Bee County Texas, on this day personally appeared A. Praeger and Lizzie Praeger his wife, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they each had executed the same for the purpose and consideration therein expressed. And the said Lizzie Praeger, wife of the said A. Praeger, having been examined by me privily and apart from her husband, and having the same fully explained to her, she the said Lizzie Praeger, acknowledged such instrument to be her act and deed and declared that she had willingly signed the same for the purpose and consideration therein expressed and that she did not wish to retract it.

Given under my hand and seal of office, this 10th day of August, A. D. 1911.

[SEAL.]

R. L. COX,
Notary Public, Bee County, Texas.

No. 27.

THE STATE OF TEXAS,
County of Bee:

I, Dan Troy, Clerk of said county, do hereby certify that the foregoing deed, with its certificate of authentication was filed for record in my office April 17th, 1912, at 10 o'clock A. M. and with this certificate of record was duly recorded May 1st, 1912, in the deed records of said county, in Volume No. 50, pages 559-560.

To certify which, witness my hand and official seal at office in Beeville, Texas, this May 1st, 1912.

[SEAL.]

DAN TROY,
County Clerk, Bee County, Texas.

83 THE STATE OF TEXAS,
County of Bee:

I, F. J. Malone, Clerk of the county Court of said county, hereby certify that the foregoing is a true and correct copy of a deed from A. Praeger and Lizzie Praeger to the United States of America as same appears of record in Vol. 50 pages 559-560, of the deed records of Bee County, Texas.

Witness my hand and the seal of the county Court of said county, at office in Beeville, Texas, this May 26th, 1917.

[SEAL.]

F. J. MALONE,

Clerk County Court, Bee County, Texas.

Indorsed: Filed Jan'y. 11, 1918.

To which ruling of the Court, the defendant then and there in open Court excepted, and such exception was allowed by the Court.

Bill of Exceptions No. V.

Be it remembered, That in said cause of the United States of America vs. Robert B. Brown, immediately after the United States had offered in evidence said certified copies of deeds from Ed. Swanton and Caroline Swanton to the United States, and from A. Praeger and Lizzie Praeger to the United States, the following proceedings were had:

Mr. Green: I offer in evidence the original of the deed from Ed. Swanton and Caroline Swanton to the United States, and the original of the deed from A. Praeger and Lizzie Praeger, to the United States. (Deeds marked Ex. No. 4 and No. 5 respectively.)

84 Mr. Dougherty: Our objection to the introduction in evidence of these deeds is that their execution has not been proven, that they do not appear to have ever been filed in the papers of this case; it only appears that they were filed on the 7th day of January, 1918, and prior to the filing of this suit, by L. C. Master-son, Clerk, in this court generally; no notice of the filing of the same has ever been given to the defendant, nor any notice that the United States of America proposed to use the deeds in evidence, and that they have never been filed in the papers in this case.

Mr. Dougherty: Counsel suggests that I ask if you did not withdraw these papers as soon as filed.

Mr. Green: I left them in the case; I got them out just now, they have been in the Clerk's office; they have not been in my custody since I filed them.

Mr. Dougherty: I have another objection; it is that the execution of the originals has not been proven; they have not been filed, and no notice has been given of the filing thereof, or the intention to use them in evidence.

Here counsel argue at length the question of admission of original deeds, without proof of execution, or filing, and notice, pursuant

to statute, also the necessity of proving title in the Government of the United States for the maintenance of the present prosecution.

Court (After hearing arguments): The objections to the admission of the original deeds in evidence are overruled.

Mr. Dougherty: Note our exceptions.

85 Said deeds, which were the originals of and verbatim identical with the certified copies set out under Bill of Exceptions No. IV, were then admitted in evidence; said originals were indorsed filed in Case No. 74, but not in 82.

And to all of which action of the Court, the defendant then and there in open Court excepted, which exception was allowed by the Court.

Bill of Exceptions No. VII.

Be it remembered, That in said Cause of the United States of America vs. Robert B. Brown aforesaid, after the cause had proceeded to trial, and while the said witness, John S. Fenner, was still on the stand, and while the jury was at the bar, the following took place:

Mr. John E. Green, counsel for the Government, stated:

Mr. Dougherty: The Government now offers in evidence deed of cession, from the State of Texas to the United States. (Exhibit No. 7.)

Mr. Dougherty: To the deed of cession which is now offered, the defendant objects: First, because it does not appear to be certified to by the Secretary of State; it appears to be executed only by the Governor. I object for want of proof of its execution, for the reason that it has not been filed for the period of time contemplated by the statute. I object to it for the following reason; that under our statutes the Governor may not execute this instrument. This purports to be a cession of sovereignty and jurisdiction, and it is the exercise of the highest power of government; it may, under our system of government be only exercised by the Legislature; if there
86 were no constitutional provision against the delegation of this power it might be delegated; but we have in our state Constitution an express provision that the legislative power may not be delegated to the Governor. Again, I object to the introduction in evidence of this instrument because it does not appear therefrom, that said instrument of cession, was for one of the express purposes contemplated by the Constitution of the United States, or by the statutes of this state; in other words, there is a general cession of sovereignty here for the "Public Purposes" of the United States which "Public Purposes" of the United States are many. The public purposes of the United States for which sovereignty may be ceded are few; and I take it that the particular public purpose must be specified in the deed of cession, or the instrument of cession; and I say that this instrument does not purport to cede the sovereignty of the State of Texas for any of the specific purposes which our statute warrants cession by the Governor; nor does it purport to cede the sovereignty for any of the purposes mentioned in the Constitution of the United States, and it is inadmissible for that reason. Further I object to the introduction of this deed of cession, because it does not appear

that the lands over which sovereignty has been sought to be ceded were acquired by the United States, I take it, with reference to the necessity that it be ceded for the specific purposes alone, that this is so well settled that it cannot be questioned.

Counsel here argue at length the question of the admissability of the deed of cession in evidence, and kindred questions arising thereupon.

Court: I overrule the objection.

Mr. Dougherty: Note our exception.

87 And whereupon said instrument of cession was admitted in evidence, and is as follows, to wit:

"THE STATE OF TEXAS,

"County of Travis:

"Know all Men by these Presents:

"That I, James E. Ferguson, Governor of the State of Texas, and acting in such official capacity and in the name and in behalf of the State of Texas, in consideration of the fact that the United States of America has acquired for its public purposes the premises hereinafter described and has made written application for the cession of jurisdiction over the said premises, under the terms and authority of Articles 5275 and 5276 Revised Civil Statutes of Texas, of 1911, do hereby cede to the United States of America constitutional and exclusive jurisdiction over the following described premises, to-wit:

That certain lot, tract or parcel of land lying and being situated in the County of Bee, State of Texas, and described in three separate tracts, as follows;

First Tract: Being a lot one hundred (100) by one hundred and ten (110) feet out of the northeast corner of Lot Number One (1) in Block number Thirty-Seven (37) in the original town of Beeville; the said lot hereby conveyed is described by metes and bounds as follows: beginning at the Northeast corner of said Lot number One, at the intersection of St. Marys Street and Bowie Street; thence South 25 deg. 31' East, with the Western boundary of St. Marys Street one hundred (100) feet to a stake in the Northeastern boundary of said Block No. 37; Thence South 63 degs. West with the boundary of a tract conveyed by G. M. Fizer to Patterson & Kavanaugh one hundred and ten (110) feet to the boundary of a lot conveyed by G. M. Fizer to A. Praeger; thence North 26 degs. 31'

88 West, with said boundary of said Praeger lot one hundred feet to the West corner of the lot hereby conveyed, in the southern boundary of said Bowie Street; thence North 63 degs. East, with said boundary of Bowie Street, at one hundred and ten feet to the place of beginning.

Second Tract: A lot of land thirty (30) feet by one hundred (100) feet out of Block No. Thirty-Seven (37) in the Original Town of Beeville, described by metes and bounds, as follows:

Beginning at a point on Bowie Street, one hundred and ten (110) feet west of the northeast corner of Block Number 37 of the Original Town of Beeville, running South One Hundred (100) feet, parallel with St. Marys Street.

Thence West thirty (30) feet parallel with Bowie Street.

Thence North along an alley one hundred (100) feet to Bowie Street;

Thence East thirty (30) feet along Bowie Street to the place of beginning and being the same property conveyed to A. Praeger by G. M. Fizer by deed recorded in Volume "Q," on page 499 of the Deed Records of Bee County, Texas.

Third Tract: A lot or parcel of land, fifty (50) by one hundred and forty (140) feet, out of said Block Number Thirty-Seven (37) of the Original Town of Beeville, described by metes and bounds, as follows:

Beginning at a point on the eastern boundary line of said Block Number Thirty-Seven, and on the western boundary line of St. Marys Street, whence the northeast corner of said Block Thirty-Seven bears North 26 degs. 31' West along said boundary line one hundred (100) feet:

Thence South 26 degs. 31' East along said boundary line fifty (50) feet;

Thence South 63 degs. west one hundred and forty (140) feet to an alley.

Thence North 26 degs. 31' West with said alley fifty (50) feet;

89 Thence North 63 degs. east one hundred and forty feet to the place of beginning, and being the same property conveyed to A. Praeger by Thomas Tyson, and others by deed recorded in Volume "F-2", on pages 415-416, of the deed records of Bee County, Texas.

Conditioned, however, that the State of Texas hereby retains and reserves concurrent jurisdiction with the United States over the premises so ceded, and every portion thereof, so far, that all process, civil or criminal, issuing under the authority of this State, or any of the courts or judicial officers thereof, may be executed by the proper officers of this State upon any person amenable to the same within the limits of the land so ceded, in like manner and with like effect as if no such cession had taken place.

In testimony whereof, I have caused the Seal of the State of Texas to be affixed.

Done at the City of Austin, on the 21st day of September, A. D. 1916.

[SEAL.]

JAS. E. FERGUSON,

Governor.

Said deed is indorsed as follows: Filed, 7 day of January, 1918. L. C. Masterson, Clerk. By J. A. Mount, Deputy, and is marked Exhibit 7.

To which action of the Court the defendant then and there in open Court excepted, and his exception was allowed by the Court.

Bill of Exceptions No. VII.

Be it remembered, That in said cause of the United States of America vs. Robert B. Brown, while said John S. Fenner was still on stand, and immediately after the introduction in evidence of the deed or instrument of cession of jurisdiction to the United States, and while the jury was still at the bar, the following took place:

90 Counsel for the Government, Mr. John E. Green, stated:

Mr. Green: I want to offer a true and correct copy of the deed, which may be admitted in evidence under Section No. 882 of the Revised Statutes of the United States, and the only reason that I got the original deed of cession, is that this being a photographic copy, it was not apparent whether or not there had been an impress upon this deed. It is admissible in evidence under section No. 882, of the Revised Statutes of the United States; any instrument that is on file in the office of the Treasurer being admissible in evidence without further proof of its validity; and the certificate attached hereto shows the character of this instrument.

Mr. Dougherty: We object to the admission of this certificate, which is attached to the deed, and is no portion of the deed, because it is not evidence of the facts therein set out, but merely heresay, and an unsworn statement.

We object to the instrument itself for same reasons urged to original deed, because if this be a copy of the instrument, it does not appear as he says, to have any seal attached to it, it does not appear to have been filed as evidence, for the period of time contemplated by our statute, and its execution is not proven.

Court: The statute of the United States makes such a document admissible in evidence; I overrule the objection.

Mr. Dougherty: I take an exception Your Honor, to the ruling of the Court.

Mr. Dougherty: I have one further objection to make, it is that, in so far as that instrument there shows upon its face, from
91 the certificate of the Federal Officer, that it was for a post-office site, that there is no allegation of that fact in the indictment, that the land was acquired for that purpose; just a general acquisition for the "Public Purposes of the United States," and that is just simply an ex parte statement, and at variance with the allegations in the indictment.

Court: Objection overruled.

Said deed and certificate were thereupon admitted in evidence, the certificate being as follows:

"United States of America,

"Treasury Department.

May 11, 1917.

"Pursuant to Section 882, of the Revised Statutes, I hereby certify that the annexed paper is a true and correct copy of the deed, dated September 21, 1915, signed by James E. Ferguson, Governor of the State of Texas, ceding to the United States exclusive jurisdiction over the land acquired as the Federal building site, at Beeville, Texas, on file in this Department.

"In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

[SEAL.]

"B. P. NEWTON,

"Assistant Secretary of the Treasury."

The photographic copy of deed of cession being identically the same as set out in Bill of Exceptions No. VI hereof, is marked Exhibit 10 and has the following indorsement:

D. Cr. No. 82. The United States vs. Robert B. Brown. Filed January 11, 1918. L. C. Masterson, Clerk.

This photographic copy is verbatim the original as set out under Bill of Exceptions No. VI, supra.

92 To all of such action of the Court, in overruling said objections, the defendant then and there excepted, and his exception was allowed by the Court.

Bill of Exception No. VIII.

Be it remembered, That upon the trial of the above cause, the following proceedings were had:

L. C. MASTERSON was called to testify in behalf of the Government, on the question of admissibility in evidence of the certified copies of deeds from Ed. Swanton and Caroline Swanton to the United States, and from A. Praeger and Lizzie Praeger to the United States, and on the admissibility in evidence of the original deeds from Ed. Swanton and Caroline Swanton to the United States, and from A. Praeger and Lizzie Praeger to the United States, which said certified copies and originals were as set out in Bills of Exceptions Nos. IV and V, and on behalf of the Government he testified as follows:

Direct examination:

Q. Your name is L. C. Masterson?

A. Yes sir.

Q. You are clerk of this court?

A. Yes sir.

Q. Do you recall whether or not I brought these deeds to you on the 7th and had them filed in the old case? (Showing to witness deeds offered in evidence.)

A. I do not recall the date, but if the indorsement shows the 7th, that is correct.

Q. I will ask you whether or not on the date this indictment was returned, I came back, and got the papers, and handed them to you?

Mr. Dougherty: We object to the question as leading, it states what was done.

93 Court: Yes, that is true, but the character of the question as leading does not amount to much.

Mr. Green (continuing): Did I ask that they should be refiled in the new case?

A. I do not recall it, you may have asked me, but I do not recall it.

Cross-examination:

Q. No notice was ever issued to the defendant or his counsel by you or any of your deputies, and no affidavit of the loss or inability to procure the originals was filed in your office?

A. No. They were simply filed, as per the notations, and upon the dates which appear upon the docket.

Q. The filing of the papers of date January 7th, was in the old case No. 74, not on the docket now?

A. No. 74 is not on the docket now.

Q. They were not filed in case No. 82?

A. If Mr. Green asked that they be filed I do not recall it; these papers were filed on the 7th; he may have asked me to refile them on the 8th, but I do not recall it.

Court: Have they been in your possession constantly since the file mark was put on them?

A. Yes sir.

Redirect examination:

Q. You have not examined your docket to see whether they were filed?

A. I know they were not filed again; the original file mark is substantiated by the entry in the docket.

Witness excused

94 Mr. Dougherty: In the light of Mr. Masterson's testimony, we make a motion to strike out these several instruments as well as the deed of cession.

Court: If this was a case involving the title of property, the court would be inclined to hear counsel's objection, but this is not such a case as involves the title to lands, but merely the cession of jurisdiction authorized by the statutes of the State of Texas; and the findings that there had been such a cession granted by the Governor of the State of Texas, is prima facie evidence that the requisites of the statute authorizing such a cession were duly met in the transaction, and therefore the Court overrules the motion.

Mr. Dougherty: To which the defendant excepts.

And to all of such action of the Court, in refusing to strike out said certified copies and said original instruments, the defendant then and there in open Court excepted, and his exception was allowed by the Court.

Bill of Exceptions No. IX.

Be it remembered, That in the trial of said cause of the United States of America vs. Robert B. Brown, while the jury was at the bar, and the witness, Joe Thornton, a witness for the defendant, was being examined by counsel for the defendant, the following took place:

Mr. Dougherty (resuming): Mr. Thornton, do you know whether of not Mr. Brown abandoned his transfer business; his personal attendance on his transfer business at your instance,
95 up there, for the purpose of avoiding, and having no further difficulty with Mr. Hermis? (Do not answer that until the Court rules.)

Mr. Green: I think that is irrelevant and immaterial.

Court: I sustain the objection.

Mr. Dougherty: Note our exception.

Be it further remembered, That if the witness had been permitted, he would have testified that he knew that Mr. Brown abandoned his personal attendance on his transfer business for the purpose of avoiding, and having no further difficulty with Mr. Hermis.

To the action of the court, the defendant in open court excepted, and such exception was allowed by the court.

Bill of Exceptions No. X.

Be it remembered, That while the defendant, Robert B. Brown, was on the stand, testifying in his own behalf, and while the jury was at the bar, the following took place:

Defendant was questioned by Mr. Dougherty, of counsel for the defendant, on direct examination, as follows:

Q. Had Mr. Hare; you know Hare, do you not?

A. Yes sir.

Q. What position did he occupy there with reference to the government work?

A. He was foreman of the building?

Q. Mr. Brown, had he made any statement there with reference to the black dirt?

96 Mr. Green: Just a minute, Mr. Hare is here.

Court: Well, if it was made in the presence of the defendant.

Mr. Dougherty: Instructions, if your Honor please.

Court: If it was in violation of these instructions, there ought to be some evidence that it was brought to the attention of the other party; there ought to be some evidence of notice of such a rule. Mr. Hare would probably be the best witness.

Mr. Dougherty: We except to the ruling of the Court.

Mr. Green: Let the bill show that Hare is here.

Court: The purpose of that question is to elicit from this witness facts as to some rule with reference to hauling dirt. I think he would be the best witness.

Mr. Dougherty: I take it that the rule or the regulation is notorious, and that it is immaterial in this case whether I prove that by the man who promulgated the rule or by the defendant who heard the rule promulgated; published by an oral statement; I take it that the manner of proof is immaterial.

Court: What I mean is this. If the purpose of that is to elicit from this witness some justification for his monopoly of the dirt dump, then it ought to have been shown by some other witness that the rule existed.

97 Mr. Dougherty: That is not the purpose, we do not attempt to show any monopoly of the dump; we propose to show—(Counsel interrupted.)

Mr. Green: I object to his stating it before the jury.

Court: I have already cautioned the jury time and again.

Mr. Dougherty: We want to show that upon the approach of Sol Miller driving the wagon up to the end of the black dirt, and to the south of which the black dirt lay, on the west side, that Mr. Brown stated to Mr. Miller that the black dirt; I cannot say just exactly the language; that the black dirt was to be reserved by the Government.

Court: If it is a conversation between the witness and Miller, I think it is relevant.

Mr. Green: I am not objecting to the conversation between this witness and Miller; I am objecting to what Hare told this defendant. We are not making any objection to what Hare said to the deceased or to Miller in the presence of the deceased.

Court: There can be no objection to your asking him anything that he said to Miller, whether it was something that somebody else told him or not.

Mr. Dougherty: That is not the point; I asked if Hare had made any statement to him as to reserving the black dirt.

98 Court: I think the objection is good.

Mr. Dougherty: Note our exception.

But it further remembered, That if the defendant had been permitted to answer the question, he would have stated that he was ad-

vised and instructed by Mr. Hare, who was the Government contractor in charge of the building of the post office, that the Government wanted to reserve the black dirt for the purpose of terracing, and did not want it hauled off.

And to such action of the court the defendant then and there in open Court excepted, and such exception was allowed by the Court:

Bill of Exceptions No. XI.

Be it remembered, That after the cause proceeded to trial, and after all the evidence was heard, and after the Government and defendant had rested their testimony, and while the jury in the above styled and numbered cause was still at the bar, and before the cause was given to them in charge, and before the Court had given his charge to the jury, the defendant, in open court, with the jury at the bar, requested the Court to give the following peremptory instruction:

In the United States District Court for the Southern District of Texas,
Corpus Christi Division.

No. 82, D. Cr.

THE UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

To the Hon. Wm. B. Sheppard, Judge of said Court:

Now comes the defendant, Robert B. Brown, and moves the Court to instruct the jury in the above cause to return a verdict
99 of not guilty in favor of this defendant on the charge made herein against him, because the evidence introduced in said cause is wholly insufficient to show any violation by him of any of the laws of the United States charged to have been violated by him, and there is no evidence that he was guilty of any offense against the laws of the United States, charged in this cause.

Respectfully submitted,

G. R. SCOTT,
BOONE & POPE,
H. S. BONHAM,
J. F. ODEM,
DOUGHERTY & DOUGHERTY,

Attorneys for Defendant.

Indorsed: Motion to Instruct of the defendant, Robert B. Brown.
Filed January 17, 1918.

And be it further remembered, in this connection that all of the testimony that was introduced in evidence on the trial of this cause,

for and against the defendant, was in substance as set out immediately following, and that all of said evidence was heard by the jury at the bar during the process of said trial.

And be it further remembered, that upon the presentation of said motion to instruct by the defendant, the Court considered the same, and thereupon, while the jury was at the bar, overruled the motion to instruct a verdict of not guilty in favor of the defendant, to which action of the Court the defendant promptly excepted in open court, while the jury was still at the bar, and saved his exception to such action of the Court in so overruling his motion for an instructed verdict of not guilty, which exception was then and there allowed by the Court.

The evidence before referred to in this subdivision of the bill of exceptions is as follows, the same being all the evidence introduced before the jury at said trial:

100 In the District Court of the United States for the Southern District of Texas, Corpus Christi Division, January Term, A. D. 1918.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

Be it remembered, that upon the trial of the above numbered and styled cause, the following were all the facts introduced in evidence:

JOHN S. FENNER was called on behalf of the Government and testified as follows:

Direct examination:

My name is John S. Fenner. I live at Beeville, in Bee County, Texas. I have lived there all of my life. I am a civil engineer and hold the office of County Surveyor of Bee County, Texas. I know where the post-office site property is located in Beeville. It is the Northeast Quarter of Block Thirty-Seven in the Original Town of Beeville. I have made a survey of it. I have made the survey with reference to the deeds of the Government. It must have been six or seven years ago. I made it at the time the Government was first seeking to acquire it. When I surveyed it at that time I made permanent marks. I placed iron pipes at each of the four corners, and I put another mark out in the road for a reference mark. That was an iron pipe known as a "bench mark," to establish an elevation by the elevation of the corners that I had given. I later made a subsequent survey of it. I imagine it must have been four or five months before the starting of the construction of the building. I located the four corners, and used those four corners, and made it up into

twenty rectangular sections, and ran levels over these. I found my same marks there at that time. I later made another examination of it. I re-located those corners for Mr. Blair, the Contractor, when he started the building in April or May, and laid out his building for him at that time.

I recall the incident of James P. Hermis being killed in Beeville. After the offense occurred I located those corners. I found the same corners that I originally placed there, the same iron pipes. The last survey that I made was along about the latter part of April, or the middle of April, before the offense occurred; that was when Blair came to start his building. I found my corners at that time the original pipes that I placed there. The morning after the killing I made a survey, the eighth of May. At that time I found pipes there. I found the corners there then. Yes sir, I made the plat which you show here. I made that map. At the time I made those measurements for this plat, the place where Hermis fell when he was shot and killed had been pointed out to me. Mr. Hair, the foreman on the job, and Mr. Walker, the undertaker, pointed the place out to me.

At this point the plaintiff, over the objection of the defendant that the execution of the deeds was not proven, either at the common law or under our statutes, and that said deed had not been filed in the papers of the case for the period of three days, as required by statute, nor had notice thereof been served on the defendant, and that no affidavit of the loss or inability to procure the original had been made by the plaintiff, or any notice served upon the defendant that plaintiff expected, or intended to offer said certified copy in evidence, and that it did not appear that the original instrument had been lost, or that plaintiff was unable to procure it, and after said objection had been overruled by the Court, and the exception of the defendant to the ruling of the Court duly made in open Court, offered in evidence a certified copy of a deed from Ed. Swanton and Caroline Swanton to the United States, and is verbatim as set out under Bill of Exceptions No. IV, *supra*, page 76.

102 And the United States thereupon introduced in evidence a certified copy of a deed from A. Praeger and Lizzie Praeger to the United States, over the same objections as were made by the defendant to the deed from the Swantons to the United States; that he, the defendant, had not been served with notice of the loss or inability to procure the original, and that said certified copy had not been filed in the papers of the case for the period required by statute; that both of said instruments were only secondary evidence of the originals, if the originals were executed, and that no proof of the execution of the original instruments, either at the common law or under the statutes, had been made, and the Court, after having heard said objections, overruled the same, to which the defendant then and there excepted: said certified copy of a deed from A. Praeger and Lizzie Praeger to the United States was admitted in evidence, and is verbatim as set out under Bill of Exceptions No. IV, *supra*, page 80.

At this point the United States offered in evidence an original deed from Ed. Swanton and Caroline Swanton to the United States, and

original deed from A. Praeger and Lizzie Praeger to the United States, deeds marked Exhibit Three and Four. Defendant objected to the introduction in evidence of the deeds, that their execution had not been proven; that they had never been filed in the papers of the case, and that notice had ever been served on the defendant that the United States proposed to use the deeds in evidence. After the said objections were heard, they were overruled by the Court, to which the defendant then and there excepted, and said deeds were admitted in evidence, and are as follows, to wit:

The Original Deed from Ed. Swanton and Caroline Swanton to the United States is as follows:

103 Omitted from the printed record, a certified copy thereof being heretofore printed at page 77.

* * * * *

Indorsed: Beeville, Tex., P. O. Warranty Deed, Ed. Swanton and Wife to the United States of America. Filed for record, 27th day of April, 1912, Dan Troy, Clerk County Court, Bee County, Texas, 10 A. M. Filed 7 day of January, 1918. L. C. Masterson, Clerk, by J. A. Mount, Deputy. Marked Exhibit 4.

Original Deed from A. Praeger and Lizzie Praeger to U. S. is as follows:

Omitted from the printed record, a certified copy thereof being heretofore printed at page 80.

* * * * *

Indorsed Warranty Deed, Beeville, Tex. P. O. A. Praeger and Wife, Lizzie Praeger, to the United States of America. Filed for record 27th day of April, 1912, 10 A. M. Dan Troy, Clerk County Court, Bee County, Texas. Filed, 7 day of January, 1918. L. C. Masterson, Clerk, by J. A. Mount, Deputy, and is marked Exhibit 5.

At this point the Government offered in evidence an instrument styled Deed of Cession from the State of Texas to the United States and to the admission of it defendant objected, that the instrument appeared to be executed by the Governor, and that, as it purported to be a cession of sovereignty and jurisdiction, it could not under our Constitution and Laws be executed by the Governor, but this power could be exercised only by the Legislature, and that our State Constitution expressly provides that a legislative power could not be delegated to the Governor. Defendant further objected that it did

not appear from the instrument that the cession was made
104 for one of the express purposes contemplated by the Constitution of the United States, or by the statutes of this state, and that said instrument only expressed a general cession of sovereignty for the "Public Purposes" of the United States, and that the particular "Public Purpose" for which the cession was made was not specified in the instrument, and that the instrument did not purport to cede the sovereignty of the United States for any of the specific

purposes which the statutes of the State of Texas warrants cession by the Governor, and did not purport to cede sovereignty for any of the purposes expressed in the statutes of the United States, and it is inadmissible for that reason, and further defendant objected to the introduction of said deed of cession, because it did not appear that the lands over which sovereignty had been sought to be ceded were acquired by the United States, which objection was by the Court overruled, to which the defendant then and there excepted; said deed of cession being as follows, to wit: See instrument of cession, *supra*, page 86, under Bill of Exceptions, No. VI.

At this point the Government offered in evidence, over the objection of defendant, a photographic copy of the deed of cession and the certificate attached thereto, the objection of the defendant to the certificate being that it is not any portion of the deed, that it is not evidence of the facts therein set out, but merely hearsay and an unsworn statement; that insofar as said certificate upon its face shows that the cession is for a postoffice site, that there is no allegation of that fact in the indictment that the land was acquired for that purpose, but only an allegation that it was acquired for the public purposes of the United States, and said statement that it was for a postoffice site is simply an *ex parte* statement, and at variance with the allegations in the indictment, and the defendant further objected that it did not appear to have any seal attached thereto, did not appear

to have been filed as evidence for the period of time contemplated by statute, and its execution was not proven. These objections were all overruled by the Court, to which the defendant then and there excepted. Said certificate being as follows, to wit: See Certificate as set out in full on page 90, *supra*, under Bill of Exceptions No. VII.

Said copy of deed being as follows, to-wit: See deed set out in full on page 86, *supra*, under Bill of Exceptions No. VI.

After the introduction of the foregoing instrument, the plaintiff continued the direct examination of the witness, JOHN S. FENNER, as follows:

In making the survey at first I examined the field notes of the deed conveying this property to the United States, and I made that survey in the light of these field notes. The lot, tract and parcel of land, which I surveyed, and around which I have the four iron pipes is the land described in the deeds. Mr. Hare, foreman of the postoffice site, and Mr. Walker, the undertaker, showed me the place where James P. Herroes fell and died. The place pointed out to me by Mr. Hare and the undertaker was within the property acquired by the Government, about eleven feet inside, according to my plat there.

To the statement of the witness, that the place pointed out by Mr. Hare and the undertaker was within the property acquired by the Government, the defendant objected to the same as a conclusion of the witness, and thereupon the Court examined the witness as follows:

Court: Did you draw that plat?

Witness: Yes, sir.

106 Court: State what part of that plat or plot was designated as the place where the body fell?

A. The place where the body fell is designated by a little black spot. I have marked it here on the top of some lines to indicate the waste dirt taken out of the excavation there, for the basement of the building. I have just marked a little black spot; and down here to the East, where the body lay is indicated by this little black spot right there.

The plat shows St. Mary's, Bowie, Corpus Christi and Washington Streets in the City of Beeville. The latter is not marked there. I mark it now. The property lies, with reference to the plat, North would be right across that way, the East and West boundaries run North 26 degrees, and 30' West. The town is not laid out exactly North and South. The plat shows an alley. It is on the western boundary of the postoffice site.

The plat, Exhibit No. 9, was then offered in evidence at this point, with the statement by Counsel for the Government that the written statement thereon that it was a map of Block Thirty-seven in the original town of Beeville, showing part owned by Federal Government, and the statement written on the plat that it shows the ground on which Hermis was killed was not offered as a portion of the plat.

At this point Counsel for the Government stated that the notice contemplated by the Statute had not been served on the defendant of the four deeds, Exhibits 3, 4, 5 and 6 above mentioned.

Continuing the examination of the witness, Mr. JOHN S. FENNER testified:

The wasted dirt shown by the lines I drew on the plat was near the southwest corner of the property. It was about four feet high at its highest point. It is about seven or eight feet wide on top,
107 maybe a little wider, and twelve or fifteen feet wide at the bottom, maybe a little wider, probably fifteen feet.

Cross-examination.

By wasted dirt I mean the dirt that was in the dump along there that had been excavated, and that was lying along the Western side of the excavation. The excavation was forty feet or thereabouts from the edge of the property. I do not know whether the dump was in places about five feet high. I am not positive as to the height of that. I just said about. I would not say positively that it was just about five feet high at places. I would not say it was not. It was some seven or eight feet at the crest. It was probably forty or fifty feet long. I did not know that the dirt at the South of the mound was black dirt. I did not notice any distinction between the black and white dirt piled there. From the western edge of the crest to the bottom of the slope, the toe of the slope, I would imagine it was probably six or eight feet deep.

L. C. MASTERSON, called on behalf of the Government, testified:

Direct examination:

My name is L. C. Masterson. I am the clerk of this Court. I do not recall the date when you brought these deeds to me and had them filed.

Q. I will ask you whether or not on the date that indictment was returned, I came back here, and got the papers and handed them to you?

Mr. Dougherty: We object to the question as leading, it states what was done?

Court: Yes, that is true, but the character of the question as leading does not amount to much.

108 Mr. Green (Continuing): Did I ask that they should be refiled in the new case?

A. I do not recall it, you may have asked me, but I do not recall it.

Cross-examination.

Q. No notice was ever issued to the defendant or his counsel by you or any of your deputies, and no affidavit of the loss or inability to procure the originals was filed in your office?

A. No. They were simply filed, as per the notations, and upon the dates which appear upon the docket.

Q. The filing of the papers of date January 7th was in the old case No. 74, not on the docket now?

A. No. 74 is not on the docket now.

Q. They were not filed in case No. 82?

A. If Mr. Green asked that they be filed I do not recall it; these papers were filed on the 7th; he may have asked me to refile them on the 8th, but I do not recall it.

Court: Have they been in your possession constantly since the file mark was put on them?

A. Yes, sir.

Redirect examination.

Q. You have not examined your docket to see whether they were filed?

A. I know they were not filed again; the original file mark is substantiated by the entry in the docket.

Witness excused.

Mr. Dougherty: In the light of Mr. Masterson's testimony, we make a motion to strike out these several instruments as well as the deed of cession.

109 Court: If this was a case involving the title of property, the Court would be inclined to hear counsel's objection, but this

is not such a case as involves the title to lands, but merely the cession of jurisdiction authorized by the statutes of the State of Texas; and the finding that there has been such a cession granted by the Governor of the State of Texas, is *prima facie* evidence that the requisites of the statute authorizing such a cession were duly met in the transaction, and, therefore, the Court overrules the motion.

Mr. Dougherty: To which the defendant excepts.

SOL MILLER, called on behalf of the Government, testified as follows:

My name is Sol Miller. I live in Beeville. I know the defendant, Robert P. Brown. I knew the deceased, James P. Hermis in his life time. I recall the shooting at Beeville last Spring, when Hermis was killed in Beeville. I was hauling dirt that day for Jim Hermis. I was working for him, driving a team. When I came to the Post Office site on that afternoon, I drove in from the North side of the alley, out of Bowie Street. I drove in the alley. He was with me. He was on the wagon. I was driving. When I turned into the alley, I drove in from Bowie Street, and drove South from the North end of the alley. I saw Robt. B. Brown at that time. He was standing on the dump. By the dump I mean a pile of dirt that was taken from the excavation at the Post Office building. They had been excavating for the basement of the building, and this dirt was thrown to one side of the property. Besides myself, Brown and his wagons were there. As I drove in the alley I made a turn; I had to make

a turn to head out North again. I turned my team to the
110 left, completely around. When I went to make the turn

Hermis got off. He was riding on the left hand side. He was sitting on the side of the wagon with his feet hanging down between the wheels. As I made the turn, the wheels cut to the side he was on. When I turned he got off the wagon to keep the wheels from catching him. Hermis came up to the back end of the wagon and went to helping to fix the boards on the wagon. It was a loose bed, and the boards were loose in the bottom, and in dumping the dirt we raised the boards off instead of shoveling it off the wagon. When we went to load it was necessary to straighten the boards on the wagon, and put the side boards back. Hermis was at one end of the wagon and I at the other. When I stopped Mr. Brown told me, "You can't load here," I asked him why not, and he said, "Because the boss don't want you to." I said, "I will load here unless Jim tells me not to." Brown turned to Jim and said, "Jim you can't get any dirt here at all." Brown immediately said, "You came here for a fuss, didn't you?" and Jim said, "No, I don't want any trouble with you," and then Brown said, "You damned son-of-a-bitch, you have been trying to pick a fuss all the week," and when he said that Hermis steps on the dump and says, "Don't call me son-of-a-bitch." Brown stepped back, and got his gun out from under his slicker. His slicker was lying right back of him. I call a slicker a rain coat. What it is, is a yellow oil rain-coat. It was lying on the ground. Brown came up there, and Jim says, "Don't shoot me Bob, I am unarmed," and threw his hands like that

Then Brown commenced to shoot. Hermis threw out his hand like this, and said, "Don't shoot me Bob, I am unarmed." Yes, sir, he threw his hands out. While he stood there with his hands like that Mr. Brown commenced shooting at Hermis. He shot at him four times. When the first shot was fired, they were standing facing each other, about five or six feet apart. After the first shot was fired, it looked like Mr. Hermis' hands were up this way (Witness

111 illustrates by raising hands and extending them in front of him. His hands were up in front of him. They were open.

They were open like this. (Witness illustrates again). Well he, Brown, kept shooting at him. He shot another shot right away. He shot three shots, and then Mr. Hermis fell. At the third shot he fell. They were standing facing, and when he fell, he fell with his head toward Mr. Brown. The witness stood up to show the jury, and stated: Brown was standing right here in front of him. Hermis was standing right where I am. Brown was here and Hermis was here (pointing), four or five feet apart, right close up together, pretty close. Hermis' hands were up. He fell with his back like this, and when he fell his head was toward Brown: he kinder caught on his elbow and hand, and then Brown walked around in front of him, and shot him, and him down. Brown was standing at Hermis' feet. When the last shot was fired, Hermis was lying up on one elbow and bracing with his hands. He was holding his head up. Mr. Brown said something, but I could not catch it, then Brown kinder looked down at him, and then turned around and walked back to where I was. Brown asked me, "What did you bring him over here for?" I said, "I didn't bring him over here. He said, 'You are a God damned liar. He said, 'You are a God damned liar, and if I had another load in my gun I would kill you.' I then ran and picked up Mr. Hermis, and raised up his head on my knee, and called for a doctor. Brown called for John Ruebush, his man. Hermis did not say anything that I could hear when Brown walked around facing him. Besides the four shots, Brown hit Hermis with a gun one time. He hit him on the side of the head. I don't know whether he hit him between the second and third, or between the third and fourth shots. He hit him on the head, on the right hand side. I know Mr. Walker, the undertaker. He came up there. When he got there, Hermis was in the same place where he fell. I still had his head on my leg, and my arm under him like this.

112 Cross-examination:

I had business relations with Hermis, the deceased. I was working for him. I had been working for him, the first of September would have been three years. I was not a partner of his. I was employed by him. I felt very friendly and kindly to him. Mr. Hermis was in the transfer business at the time I was employed by him. Brown was also in the transfer business. I do not live in a house of Mr. Hermis'. I had known Mr. Brown ever since I had been in Beeville. I do not know that I have taken an active part and interest

in the prosecution of this case since the occurrence, no more than anybody else would have done. I helped to get up witnesses, and all those things. I helped the man who was sent there by the Government. When he would tell me to go and get a man, I would go and ask the man to go over and see him. I did not help the private prosecution. I brought witnesses to Mr. Jack Dougherty's office, in that to be sure. I do not know how many witnesses I took up to his office. When Jack would ask me to go and get witnesses, I would tell him he wanted to see him. Ossie Hermis told me to go and do that. He is Mr. Hermis' son. I don't know how much time I devoted to getting up the prosecution of this case. I never kept up with it. I did not put in about a month or two. My idea about it is that I put in about a day and a half, something like that, one or two days. I did not bring all the negro witnesses around there. I did not go and see all the Mexican witnesses. I may have brought up one or two, but not all of the Mexicans and negroes to Jack Dougherty's office. I did not receive any pay for any work in this case in aiding the prosecution of this case from anybody. I was only working by the week for Mr. Hermis, and still work for Mrs. Hermis. I am still working for her; I stayed on.

After working for Mr. Hermis for three years, my relations with him were very friendly. My relations were not friendly with Mr. Brown. Prior to the homicide they were not friendly. I
113 had not spoken to Mr. Brown possibly for three or four months, maybe six months. Mr. Johnnie Ruebush was aiding in the transfer work there. He was working on the wagons, the same as I was. He quit speaking to me, and I quit speaking to him. I had been hauling dirt a good little bit there. Mr. Hoolihan was on the wagon prior to this particular load. He had not been hauling all day. I had hauled one load after dinner by myself. Outside of that, until the last load was hauled, Willie Hoolihan had accompanied me on every load.

The last time that Hermis had been to the dirt pile to haul dirt before the homicide was about the first of the month. That was about a week before the homicide. Willie Hoolihan is not in attendance on Court. I have not seen him that I know of. He was in Beeville at the time I was getting up the witnesses there for the prosecution in this case. Mr. Hermis was there at the first of the month. I know Ike Archer. He was there on the day of the homicide. I had known Mr. Hermis for many years. I do not know how many knives Hermis usually and customarily carried with him. I suppose he carried one, I do not know. I have seen him with a knife. I have seen him with one or two different ones; I do not remember nothing about it. I could not say how many he customarily carried with him. He had a long Barlow knife, with a long single blade. It was just a one bladed knife. I do not know how long the blade was. I never measured it. It is pretty hard to approximate the length of the blade. I never measured it. I might say it was one inch and I might say four. It might have been two and a half inches, or three inches long. I do not know; I cannot say. It could

not have been longer than that. I do not know whether it was a Barlow knife or not. It was a one bladed knife. I don't know that he had two knives. I don't know that he pulled two knives on Mr. Brown prior to that time. The only knife I recall was the single bladed knife I am speaking about. I never saw any other.

114 Mr. Hermis had not been down to the scene of the homicide and hauling dirt since the first of the month that I know of. On this particular time that I took the last load of dirt from there, prior to the homicide, I was with Willie Hoolihan. I loaded a wagon load of dirt. I drove out to Bouie [Bowie] Street, the street running from the hotel to the depot; we did not go down Washington Street. We went around back of the First National Bank. The First National Bank building lies just East of the Sap. depot. As to the time of day we drove back there, the three-twenty-one train had come in. Hermis ordinarily met that train. I knew of this fact from many years experience there with him. Mr. Hermis met it whenever he could get to it. I did not know that he would be there at that particular time. I thought in all reasonable probability that I would find him there, and I went up there and looked for him. I drove around the back of the First National Bank, which lies immediately East of the Sap. depot and the scene of the homicide. I got out there in the middle of the street, if that is East of the depot. I drove behind the Bank, and stopped the wagon in the street running by the post office, east and west, crossing the street by the post office. I gave Hoolihan the lines. I went over to see Jim Hermis, and then Hermis and I came out together. I just walked up and got on the wagon, and Hermis walking up to the wagon after me, and we went on with our business. We had a little conversation there walking up. We did not stop there and converse. Hermis at that time had a load of boxes and kindling that he was going over to Lamos Langley's with. He was at the train to meet the train when I got him and brought him away. Lamos Langley's house was on the hill, close to the new graveyard. It was on another street from the direction of the excavation, the opposite street, about eight or ten blocks. He told me that he had a load of boxes for Lamos Langley, when he came around and told Willie Hoolihan to take them. I do not know where his wagon load of boxes was at the time I took him away from the train down there. I did not
115 see any. I had this conversation with him. I then got on the wagon again with Hoolihan and drove it up behind Nutt's Taylor shop. I do not know where Hermis had his wagon. Hermis asked Hoolihan, "Do you know where Lamos Langley's is?" and then he got on the wagon with me and came to the scene of the homicide. I did not bring Hoolihan around in my investigation and collection of the evidence and of the witnesses. I did not bring him around to have him interrogated. I do not know whether Jack had him or not. I never said anything to him, because they never told me to get him.

When we got back around, we drove up Bowie Street. I recognize this sketch here. This is Bowie Street where the First National Bank building is located on this corner. I will mark it First Na-

tional Bank. The Sap. depot where Mr. Hermis was is here. The street runs right across the track; the street lies right here. Well I guess the block that the depot is on is out to the North of the First National Bank. The express office is here. Further North there is a street running parallel to Bowie Street, West side of Washington Street. The Nutt store is on Washington Street, facing East, on the West side of Washington Street. We came down Bowie Street, went around the First National Bank, and stopped out here, in the street, near the point where the train stopped, the 3:21 passenger. I got out, went over and got Mr. Hermis, and we walked up together. He came back with me, and then I went on up back of Nutt's, and Hermis went on around this street parallel to Bowie Street, whatever its name is. I don't know how he came back, but he came to the wagon, and then he sent Willie Hoolihan up to Langley's I drove back with Mr. Hermis in the unloaded wagon. Brown was on the dump when I first saw him. He was right at the end of the dump, as far as the dirt had been taken back. I guess he was something like 10 or 15 feet, maybe 20, from the end of the pile of dirt. When

116 I drove up there Brown was looking at us, at me. I suppose he was looking at me, or both of us. It is not a fact that at the time I drove up there he was standing with his back to an electric light post there, looking out Eastward over the excavation, and watching his men engaged in their work, and superintending them there. He was standing up facing North. We came up from the north end of the alley and turned West. Brown was looking North. My mules were standing right by the electric light post. The electric light pole was right at the end of the dump, at the North end. I was about 8 or 10 feet from Mr. Brown when I began the conversation with him. Brown first spoke to me. The first thing he said to me was that he told me I could not get any dirt there. He had not stopped me from getting dirt prior to that time. I had been going there all the time, getting the dirt, and he had been there off and on all the time. He was there superintending this work, and I had gone there uninterruptedly and gotten dirt, and had had no words with him, and without any previous statement he said I could not get any dirt at all. I did not know at the time that the Government wanted the black dirt for terracing. I had not heard that. The tone of his voice was like that I just did not have no right there to get it, that is all. When Mr. Brown spoke to me Mr. Hermis did not say anything to Mr. Brown. Mr. Hermis went directly up the dump from the back end of the wagon where he was fixing the boards. When he got up on the dump Brown was nearly East of him. The shooting began as soon as Brown got his gun. He got it out of a slicker. I do not know — far it was from the point where Hermis climbed the hill, and where Brown was directly East of him, to where Brown got his gun. He went five or ten feet back there to where his slicker was. The shooting occurred at some five or six feet distance, something like that, I do not know. Brown did not walk North to his slicker. He went East, close to where he was standing. I do not know how wide the dump was; I never measured

feet wide. Brown's slicker with his pistol in it was directly
117 East of him a little ways, I do not know how far. When Mr.
Brown retreated to the East Mr. Hermis stood still when
Brown got his gun, and then Brown commenced to shoot at him.
Brown walked back to him and commenced to shoot at him. I am
sure about that. I do not know the range of the bullets. They were
a little bit towards the Northwest I guess. Brown's slicker was lying
over on the Eastern side; I do not know whether it was on the edge
or not. Brown rushed down and grabbed it up like that. Mean-
while Hermis was standing up on the dump. The first shot com-
menced right there at the front end of the dump, right where he was
when we came up, and when it concluded Brown walked straight
over West to where Hermis was. Brown was retreating southward
all the time when he commenced to shoot. After the first shot he
began to move off all the time and move Southward. Brown was
retreating toward the south, moving around there, both of them.
Brown was retreating to the Southward, going South. Yes, sir, he
was retreating.

By the Court: Was he going backward or forward?

A. He was backing up.

I do not know how far Mr. Brown went backward, maybe 30
feet. During all that time Mr. Hermis was protecting like. He was
trying to protect his face from the bullets. He had his hands up.
At the last shot Mr. Hermis was some 30 feet from where Mr. Brown
had retreated. The fatal shot was then fired at a distance of some
30 feet. The distance between Brown and Hermis at the first shot
was something like 8 or 10 feet; at the second shot they were about
the same distance apart; at the third shot they were a little further
apart; I do not know how much further, about 12 or 13 feet, some-
thing like that maybe.

118 Q. Then the next shot at the distance of thirty feet as you
stated a moment ago?

A. The distance of thirty feet; you wanted to know the distance
from where it commenced to where the last shot was fired?

Q. No, I asked you the distance between them when the last shot
was fired, and did you not state that the distance was thirty feet?

The other eye witnesses present at the time were Mr. Toomey, Mr.
Lutz, Ellis Quinn, Max Clements and Dave Stockbridge. There were
three Mexicans also.

I did not say to Mr. Hermis when he started up the dump, "Go
to him Jim," "Go to him Jim," and I did not "holler" that during
the shooting.

I know Homer Lee McKinney and Joe Thornton, who is sheriff,
I had not picked up the knife of Jim Hermis in the presence of
Paul Perkins. I did not say immediately after the homicide, in the
presence of Homer Lee McKinney, and say to the sheriff, "Paul
Perkins knows how I came to be with Jim Hermis' knife," and I
did not, in an effort to make this look as black as possible for the

defendant, state to Paul Perkins that the first shot knocked Jim Hermis down, and that the last three shots were fired into him while he was down on the ground I did not say that the fourth shot was fired by Mr. Brown, that he walked right up and stuck the gun against Hermis' body and fired it.

Redirect examination :

I now state that Brown was standing over Hermis when he fired the fourth shot, and he was standing at his feet, over him.

When I gave my answer in reference to thirty feet, I understand from the time of the beginning of the shooting to the end of it, the time the last shot was fired. I did not mean to say that Brown was at a distance of thirty feet when Brown fired the fourth shot. I meant Hermis was on the ground about thirty feet from where the shooting first occurred.

119 Brown was the larger of the two men. He was a good deal bigger man than Hermis. Hermis would weigh about 155 or 160 pounds, something like that. I would estimate that Brown would weigh about 175 or 180. Hermis was in his shirt sleeves with his vest on, and his sleeves rolled up.

N. B. WALKER, called on behalf of the Government, testified as follows :

Direct examination :

My name is N. B. Walker. I am an undertaker in Beeville. On the day Jim Hermis was killed I went to his body, I think before four o'clock. He was lying back of where the new post office was on some dirt that was piled up there. There were quite a number of people with him there. Mr. Sol Miller had his head, and he was lying on top of the dump. I afterwards pointed out that place where he was lying to Mr. Fenner, the surveyor.

Cross-examination :

I took the body of Jim Hermis to my place of business, and undressed it.

Redirect examination :

I have seen that map. The streets do not go directly North and South, they run little west of North and this is near the southwest corner, on the west side. The post office building is here (illustrating) and here is the plot back here. There is some dirt piled up near the line. The line running from the southeast corner meets the line running from the northeast corner on the top of the dump. That black mark that you find there is as near as I can indicate it on the southeast corner where I found the body. It is where the line drawn from this corner on the East, line 1, 3, 4, meets line 14' where they angle there.

120 Cross-examination:

The lot is about 150 feet square. I would say that the body was about 15 feet from the west side and 35 feet from the south side as near as I can tell. The body was about 150 feet, or more, from the North side of the lot. It was near the center of the dump. There was an electric light pole right close to the line of the west side, about 25 — I would think from where the man was lying. It was on the western edge of the dump, and to the Northwest of the place where the man was found. I should judge the dump was about 5 or 6 feet high. I do not know exactly, and about 15 feet across the top.

WALLACE TOOMEY, witness called by the Government, testified:

Direct examination:

My name is J. W. Toomey. I am 46 years old. I am in the windmill work, live in Beeville, was there on May 7th, 1917. On the afternoon of that day I was in town around the postoffice and up and down the streets. I was around where they were excavating to build the post office building. I saw the shooting there. A shot first attracted my attention. At the time I was standing close to the northwest corner of where they were excavating. I heard a shot, and I turned to my right, and I seen two men facing each other. They were something like 8 or 10 feet from me. He shot two or three times. There were several shots. When I first saw the two men, the dead man was the nearest to me, something like 45 feet. He was closest to me. When I stated they were something like 8 or 10 feet from me, I meant that the two men were that far apart. I seen them shoot 2 or 3 times. I could not state how many times. I saw Mr. Brown shoot 2 or 3 times. I could not tell how many shots, and then Mr. Hermis sank down and fell with his head
121 towards him like towards Mr. Brown, and on his right side,—
fell on his right side (Witness illustrates by turning around and leaning over to one side while doing so). He was on his right side leaning on one arm slightly lifted from the ground. He was leaning on his right arm, fell on his right side, then Mr. Brown walked nearly half way around and shot him the last time. When Mr. Brown shot Hermis the last time, Hermis was lying perfectly quite on one elbow with his body slightly lifted. After that shot was fired, he seemed to go down more,—there was more relaxation. After that shot he was just lying perfectly still. He was still on his arm. By saying he went back I mean he sank down more lower. I could not say how far Brown was from Hermis when Brown shot him the last time, 3 or 4 or 5 feet from him. (Witness illustrates on floor where Hermis's feet were with reference to Brown). Hermis was lying out there, Brown walked right up and shot this way. Hermis was dressed in his shirt sleeves, I think he had a vest on. When I heard the first shot and looked around Hermis had both hands up. Mr. Brown was on the highest ground. The ground

was slightly higher, and Hermis was in the lower place, and his hands were this way in front of him. Yes, sir, they were in front of him. I could not tell you whether his hands were open or closed,—only I saw that he did not have no gun. I thought at first that both men were shooting. As to how he was standing when I saw the next shot fired, the first shots were all right together. When he walked around and shot the last time that was one shot. I do not know how his hands were then. I did not come up. I ran for the doctor.

Cross-examination:

Mr. Ellis Quinn, Mr. Lutz and Dave Stockbridge were standing with me at the time my attention was first called to the difficulty.

About 20 feet south of the northwest corner of the excavation,
122 I heard a shot and turned around. When I turned around

Mr. Brown was something like 50 feet from me towards the south. Mr. Hermis was not exactly North of Mr. Brown between me and Mr. Brown, but practically so. Mr. Hermis' back was almost toward me. When I saw Mr. Hermis he was not going toward Mr. Brown, he was standing still. From where I stood I could tell that Mr. Hermis' hands were in front of him. I did not pay any attention to whether they were open or shut at the time. I did not see any gun. Mr. Hermis made no advance at all. He was standing still throughout the whole period of the three shots, and he fell right at that point. That was something like 45 feet from where I was. I do not know whether it was 2 or 3 shots, or how many, that I saw Mr. Brown fire. He was something like 6, 8 or 10 feet from Mr. Hermis, something like 8 feet. Mr. Hermis then sank down at that time. He fell with his head toward the southeast, not exactly toward Mr. Brown. Brown then walked around. Mr. Brown was at that time almost North of Mr. Hermis' head, almost North of him when he fired. The first shots were fired at a range of 8 or 10 feet, and the last one was nearer when he walked around. I did not see Sol Miller there, and I did not hear anyone "hollering," "Go to him Jim," "Go to him." During the time Mr. Brown was shooting, I think he was standing still. I could not say. I could not swear that he was standing right in one place.

S. B. HARDY, a witness for the Government, being called, testified:

Direct examination:

My name is S. B. Hardy. 70 years old. I live in Beeville. Am a farmer. On the 7th of May I was around where they were excavating, in the neighborhood of the postoffice site. I saw
123 part of the shooting, where Hermis lost his life. When I first heard it, I was right on the west side of the block that the postoffice is in, standing on the sidewalk, about halfway of the block, by Mr. Teal's butcher shop. The first thing I heard was a couple of shots. Some men were standing there, and some of them said it was blasting. I went down there a-foot. The first thing I saw was a

bunch of men standing on the dirt that was hauled out of the post office, and there was a pistol fired among the men. I saw the smoke and heard the report. I just saw a pistol fired, and I just stood still and looked. Two or three minutes after that I saw a man walk out from among these men with a pistol in his hands. That man was Mr. Brown, the defendant. He walked out with a pistol in his hand. I looked in front of him and saw a man lying on the dump, and looked like he was resting himself on his hands and elbow. The lower part of his body was down, but his shoulders were lifted. Brown then walked up and shot him, and then walked back to this bunch of men and laid his pistol down on his slicker. He turned with his back toward me, and stooped down and then walked off, and I never saw him any more. The man lying there was Jim Hermis. It looked like he was on his elbows, but I would not be positive. His body and head were lifted, but his feet stretched out. I could not say how close Brown was to him when he shot the last shot. He walked right up to his feet, I suppose 3 or 4 feet from him. Just as he fired, Hermis settled over backwards, flat. I went up there then, and Mr. Miller he had got there, and when I got there he was there, sitting down on the dump with Mr. Hermis' head in his arms, and calling for a doctor. I said, "There is no use of getting any doctor," for I seen he was dead right then. He died right there, in about 5 minutes from the time he drew last breath. He only gasped about 4 or 5 times after I got there.

124 Cross-examination:

I was between the difficulty and Teal's butcher shop, I suppose West. I was probably 40 feet from the dump he was killed on. I heard two shots before I went there, but I did not think they were shots. I only saw two shots, but the next to the last shot I could not see who fired it. As a matter of fact I did not actually see the third shot. I saw the fourth shot. At the time of the third shot there was a bunch of men standing on the dump gathered around when I first got there, and after the shot Brown walked out from these men and shot the last shot. My view of the third shot was obstructed by a crowd that had gathered there. I could not see, I saw smoke. I could not say exactly how many people were in the crowd gathered there, I suppose about 12 or 15 men. So far as I could see it looked like the men were just standing there, and after the last shot was fired, it was sometime before anybody went to Hermis, except myself and Miller. At the third shot, in my judgment, Mr. Brown was about 30 or 40 feet from Mr. Hermis. At a rough guess, I would judge something like that. He made several steps up there. Mr. Brown was North of Mr. Hermis, and Hermis was 30 or 40 feet south of Brown. Brown walked out towards Hermis, when the third shot was fired. I should judge he walked about 20 feet. It drew my attention when I saw him with the pistol. I would judge that it was some 20 or 25 feet that Brown walked toward the south after I saw him. He didn't walk around Mr. Hermis, he just walked right up to his feet and shot, and then walked back. I have got

these directions clear in mind. If the dump is as I call it North and South. The way the dump and post office building sit. North is towards Bowie Street, and from that direction I saw Mr. Brown come out of a crowd of 12 or 15 men and walk about 20 or 25 feet. I might be mistaken in the distance, it is a sort of guess. I should judge that Mr. Hermis was $\frac{2}{3}$ of the way south on the
125 dump, and Mr. Brown was $\frac{2}{3}$ of the way North on the dump, that is when I saw the pistol fired, but I do not know who it was that fired it. That pistol was fired about $\frac{1}{3}$ of the way from the north end of the dump. I was not there at the time of the first shot.

LEWIS ROY, a witness for the Government, testified as follows:

Direct examination:

My name is Lewis Roy. 66 years old. On the 8th of May, 1917 was down at the pit where they were excavating for the Government building in Beeville. I saw part of the shooting that occurred in which Hermis lost his life. I heard the two shots, and this first attracted my attention. I looked around up town, then back towards the street where the shooting was. I saw Mr. Bob Brown up there, and Mr. Hermis. Mr. Brown had his pistol up in his hands that way (illustrating), and Mr. Hermis had his hands sort of up, and a little bit stooped over, and he straightened up, and then Mr. Brown shot him again. Mr. Hermis then staggered and fell on his all-fours. Brown then stood there a little bit and talked to him. I could not hear what he said. I just saw his mouth working. Mr. Brown then walked up to Mr. Hermis, and he looked like he hit at him with his pistol on his head. I could not state whether he hit him or not. He hit him right on the side of the head it seemed like. It was on the right side of his head, then Mr. Brown straightened up and walked around Hermis, just walked right around him towards his feet and shot down on him. Hermis was lying at the time the last shot was fired flat of his back. Brown was standing up there, going around him. He fell over that way when he fell. Mr. Brown was right up to him when he shot him, and Mr. Brown
126 seemed to be talking. I could see Mr. Hermis. He was moving his hands and talking with him. I could not tell whether he was talking or not. I just seen that he was working his hands like he was talking—I could not hear. I did not go up there after the shooting.

Cross-examination:

I was standing right close to the corner of the fence when I heard the first two shots. I believe it was the northwest corner of the pit. I was a friend of Jim Hermis. I was acquainted with him. I did not think a great deal of him. I do not know as I was a friend of his. I was looking right toward the pit when the first two shots were fired. I did not turn around at once. I looked up town and then looked back toward the dirt. I then saw Mr. Brown standing

there with a pistol in his hands like that (illustrating). Mr. Hermis was standing there sort of bent over. He had up one hand. There was no one at all around Mr. Brown that I could see. Mr. Brown was more west of Mr. Hermis. The dump runs North and South. Mr. Hermis was not exactly between me and Mr. Brown, he was standing a little off to one side from where I was standing. Mr. Brown was not standing exactly the other side of Mr. Hermis. He was a little west of him. He (Mr. Brown) was not south of Mr. Hermis. I know where the northwest corner of the excavation is. I was up toward the north end of the dump, and Jim Hermis was very near between me and Bob Brown. Hermis' back was to me. I could not just tell at this point that Hermis was right at Bob Brown. It looked like he was very close to him. He was not right at him. He was a little way off. I could not tell how far, he was on the other side of him. I saw Mr. Brown when he fired the third shot. Mr. Hermis was just standing there, straightening up. Brown looked like he was about 3 or 4 feet from him. They were practically right together. They might have been as close as arm's reach.

I did not see that Mr. Hermis grabbed Mr. Brown's pistol.
127 He had straightened up when I saw him and come loose from Mr. Brown. That was before the third shot that I see him, and Mr. Hermis was just straightening up, and had his right hand up and open. I was not exactly behind him, I was a little bit to one side. I reckon I was about 30 feet north of him, and back of him. I could see Hermis' right hand, because he had it up that way (Illustrating with hand up), and I was a little bit off to one side. I seen his hand for a little bit. I was not exactly behind him. I was nearly straight behind him, but I was not behind him. I did not see Mr. Brown walk some 25 or 30 feet down south to Mr. Hermis and walk up to him. Mr. Brown was a little west of Mr. Hermis. As between north and south, Brown may have been a little bit south, I could not say, but I did not see him walk some 30 feet from the north of Hermis. If it occurred I did not see it. Mr. Hermis did not fall right at the third shot. He staggered and fell on his all-fours, sort of on his left hand. He got down on his left elbow. He fell a little toward Brown, a little closer than he was when standing up, nearly straight north and south, then I saw Mr. Brown come up and hit him 2 or 3 times over the head. He hit him with a pistol. I saw him hit at him. I do not know that he hit him three times. He walked up and went to beating down that way. (Illustrating.) I just seen him come up and hit down this way 2 or 3 times. I do not just know how many times. I could see Mr. Hermis' hand moving, and directly he moved his hands and I saw the side of his face, and just about the time I saw him the pistol struck him, right there on the temple, right above the ear. That was the first blow I saw. No, he did not hit at him twice more. Before that he hit at him twice. I could not tell that he was hitting at him hard. I was not working for anyone at that time. I have been working for Mr. Wood since. He hit at him 2 or 3 times. I could not just tell exactly what he was doing. I thought he was hitting at him, and after he hit him a time or two he leaned down

and I saw Hermis' hand move, and I saw the side of his face
 128 at the time the pistol struck him. Then Brown straightened
 up and walked around him, and then shot right down on
 him again. Mr. Hermis was not on his elbows at the fourth shot
 he was lying right flat on his back. Mr. Hermis had already
 straightened up, he was already standing up when I looked over
 there at the third shot. They were not in the embrace of each other
 at the time, not tangled up; they were standing off. Mr. Brown had
 his gun in his right hand.

ALBERT WALSLAGER, called in behalf of the Government, testified:

Direct examination:

My name is Albert Walslager. I live in Beeville. I am in the
 hardware business. Have lived in Beeville six years. I know Robt.
 Brown, and knew Jim Hermis in his life time. I saw part of the
 shooting in Beeville in which Hermis lost his life. I was in the
 back of the hardware store. There is a little alley between the main
 building and the warehouse. The hardware store, main building,
 is about sixty feet from the Government site where the postoffice is
 being built. I was about that far from the Government site. I
 first heard two shots. I then ran around there to see what it was.
 I heard the shots and ran around to see what was going on. When
 I first saw Brown, when I first came around, he was walking to the
 right of Mr. Hermis. Mr. Hermis was on his back on the ground
 trying to get up. I saw Mr. Hermis on the ground in a leaning
 position. He had his hands out like this (Witness illustrating).
 I mean he was kinder on his back, bracing up with his hands, more
 on the left elbow and the right arm. He had his hands to the
 ground, and Mr. Brown then walked around in front of him and
 shot him again. That is all the shots I seen I thought I heard Her-
 mis say, "Don't shoot." Brown seemed like he said cus-
 129 words, "Damn you, I'll give you another and fired another
 shot." Yes, sir, fired another shot down into him.

Cross-examination:

At the time of the homicide I was in the John E. Wilson building
 on Washington Street. I was not on Washington Street. I was
 back of it at the rear, which runs on the alley between this business
 block and the postoffice site, and we have a ten foot space between the
 main building and the warehouse site, that is where I was. I was
 between the warehouse and my present place of business. I heard
 two shots. I could not see anyone from where I was then. I went
 to the right around the warehouse corner. I was standing near
 Walter Teal's butcher shop when the third shot was fired, on Teal's
 lot. I do not remember the part of the lot though, right behind the
 butcher shop. When the third shot was fired Brown was standing
 right in front of Mr. Hermis, Hermis was on his back trying to get
 into a sitting position. After the third shot was fired Mr. Brown
 took his gun and laid it down on his slicker. He did not fire any

fourth shot that I know of. When I got past to the corner of the warehouse, and on to Teal's lot I could see east over to where this was going on. The only shot I saw was the third one. It was not fired immediately that I got in view of the parties. Brown was on the right side of him. He walked one or two steps right immediately in front of him, and then fired the third shot. I think immediately afterwards Brown went over there and laid his gun down. He must have had it lying there I guess a few minutes, and I went back in the building and saw Mr. Hermis was killed, and rang up Ossie and told him to come and see about his father. I did not see Mr. Brown hit Mr. Hermis over the head two or three times. When I first saw Mr. Brown he was on the right side of Hermis, and stepped in front of him. Hermis was on the ground when I first saw him, endeavoring to get up. He was kinder lying down on his back. There were more words said. I heard Mr. Brown swear and say, "Damn you, I will give you another one." I am positive of that. Then he shot again. I saw just one shot. I had just gotten past it and seen him take one or two steps, and Hermis seemed like he was begging him, and said, "Don't shoot," and Brown said, "Damn you, I will give you another one," and shot him. I now say positively that that is what he said to the best of my recollection. I saw and heard all of this as I stepped behind the corner of the warehouse in plain view. Yes, sir, I came out there and was walking right out in front of him, and I see Hermis on the ground and he said "Don't shoot," and Brown said "Damn you I'll give you another one." I had heard two shots before that. I was about 6 feet from the corner of the warehouse when I heard those shots. I then walked six feet to the south corner, and then I saw Mr. Brown walk up and shoot him. I do not remember exactly where I was when the first two shots were fired. My best judgment would be, as to distance, that it was half way in the middle of the building or 12 or 15 feet. That would be the distance I walked after I heard those shots until I saw the last one, and when I got to the corner I saw and heard it. The warehouse is about 35 or 40 feet long. The lots are 140 feet lots I suppose. The main hardware building is from 80 to 90 feet long. The warehouse is some 35 or 40 feet long. The east end of the warehouse is on the alley. It was about 55 feet from where I was to where the homicide occurred when I saw it. I might have seen Mr. Hardy, but I do not remember seeing him. Mr. Hermis' statement at the time he was on the ground was not very loud. (Witness says "Don't shoot me," in a voice slightly modulated.) I could hear Mr. Brown's statement a little plainer than Mr. Hermis'. He naturally had a plainer voice, and you could hear him better.

131 Redirect examination:

I was about 55 feet from Mr. Brown when I heard him say, "Damn you, I'll give you another." It was higher where Mr. Brown and Mr. Hermis were at, the time than where I was standing.

Recross-examination:

I have not subscribed anything to the private prosecution of this case. I have not promised in any way to aid in this. I have not paid any particular attention to this trial. All I want to do is my duty, and that is all.

Redirect examination:

Immediately after the shot I saw was fired, Hermes fell backwards. He was, as well as I remember it, with this elbow on the ground, and this hand kinder this way (Illustrating), and was sort of raised up, and he fell back when the last shot was fired.

Dr. J. H. LANDER, a witness for the Government, testified:

Direct examination:

My name is J. H. Lander; I am a surgeon by profession. I have attended the University of Alabama, the Southwestern University, Post Graduate work at Tulane, New Orleans; New York Polyclinic; New York Post Graduate. I have been a physician for ten years, and have specialized in surgery for the past six years. I am a Capt. in the United States Army, connected with the 6th Cavalry, at Fort Sam Houston; I was at Del Rio, at the Hospital; I have been assigned to the 6th Cavalry since I came to this court. In May 1917 I was in Beeville, Texas, engaged in practice of medicine and surgery
132 there. I had lived there for about two and a half years. I knew James P. Hermes in his lifetime. I performed a post-mortem examination upon his body.

Q. Will you detail to the Court and jury the findings?

A. Will I be permitted to refer to my finding as I had them written at that time?

Court: Did you have them written at that time?

A. I had them written. Dr. Egbert who was present at the examination wrote them; I would not be positive that I signed them.

Mr. Green (presenting paper to witness): That is the original that was made, and he signed it at the time.

Court: He may refer to that one.

Mr. Green: Refer to the original.

Witness (Continuing):

The findings were as follows: In this heading, the way it is arranged is just as we examined the various wounds, No. 1 is a contusion of the right ear, cutting the cartilage of the ear transversely, for a distance of about one inch and one half an inch wide. It was just a bruise and splitting of the cartilage of the right ear, just in one direction; I do not remember exactly what direction it was; It says here transversely. It was cut across for a distance of about one inch, and a half inch wide; the one inch would be from forward backward, and the half inch would be up and down. I have the

bullet wounds lettered "A," "B," "C," and "D." "A," bullet wound on the anterior surface of the left thigh, about three inches below the groin; bullet ranging backward and slightly downward, fracturing the upper third of the femur. That is, on the front part of the thigh, about three inches below the groin, and the bullet went almost directly backward, but slightly downward and inward, and broke the leg in its upper third, or the femur as we call it; the long bone in the leg. "B," the bullet wound about one inch to the left of the upper third of the sternum. About one inch to the left of the breastbone, coursing superficially, outward, and upward, lodging on point of left shoulder, just under the skin. It stopped right on the point of the shoulder. It did not penetrate the cavity of the chest. "C," bullet wound two inches above left nipple; about here (illustrating upon his own person) coursing superficially outward and backward about nine inches from the point of entry; it lodged just under the skin of the armpit, and did not penetrate the chest cavity. "D," bullet wound about one inch to left of breast bone, in the 5th intercostal space; that is, between the 5th and 6th ribs; bullet coursing backward, and very slightly downward and inward, severing the last portion of the thoracic aorta, and entering the abdominal cavity through the diaphragm about one-half inch from the spine. Left side of the thorax was filled with blood. The abdomen was not opened, as cause of death was ascertained by finding aorta severed. The aorta is a blood vessel leading from the heart and supplying practically the whole system; it passes down from the heart, right along the course of the backbone, to the lower part of the body. The wound severing the aorta, or large blood vessel, was the fatal wound. There is just one blood vessel that supplies the body from the heart, and that one is the thoracic aorta.

Q. A man having received the wounds which you found from this examination; if the testimony showed that after he had received three shots from that pistol, he was on the ground, lying there on his back, or slightly to one side, resting on his arm, or elbow, or on his arms and elbow, attempting to move himself forward or upward, apparently talking; or talking; what would you say was the time that the last wound that you have described was received?

134 Mr. Dougherty: We object, as the question is one that invades the province of the jury, it is not proper.

Mr. Green: By time, I mean the order.

Mr. Dougherty: We object, that would be an invasion of the province of the jury, calling for an opinion on a question of the time and order in which the bullets were fired, which is not a proper question for expert testimony, but the matter is to be determined by the jury from all of the facts and circumstances of the case; they will determine from the courses, etc., of the various bullets how these shots were fired. We take it that is improper, and object to the question.

Court: An expert certainly could testify as to the direction from which a shot came.

Mr. Dougherty: I do not object to that, but that is not the question that is directed to the witness.

Mr. Green: The purport of my question is this; that from the ex-

amination of those wounds, to state in his opinion which shot was the last shot fired; that is the purport of it; I want him to state it and give his reasons for so stating.

Court: You had better qualify him a little further as to what position the man was in.

Mr. Green: In my question I gave him the position that the man was in.

135 Court: At this particular shot?

Mr. Green: I will ask him a few more questions.

Witness (continuing):

From my knowledge of the human anatomy and from my experience as a surgeon, it would not, in my opinion, be possible for a man to support himself on one or either arm, after receiving the fourth shot which I have described. He certainly could not carry on a conversation; he might be able to speak, although I could not state positively as to that, for I do not know; he certainly could not say a great deal, because he is practically dead instantly, on account of the great extravasation of blood, the vessels just emptying themselves, producing an immediate anemia of the brain. By that I mean that the emptying of all the blood vessels of the brain would produce an unconscious condition almost instantly, as instantly as we would be able to imagine. In my opinion death and unconsciousness would be produced more quickly by the severance of the thoracic aorta, than by shooting a man in the heart, because, the heart is a thick muscular organ with great powers of contraction, and it would probably close down on a heart bullet wound, so that the person would not bleed as rapidly as he would by severing one of these large blood vessels, with the heart pumping the blood out. In my opinion the man would die quicker by a severance of the aorta than by a punctured heart.

Mr. Green: I will repeat my question, your Honor.

Q. From your examination of these four bullet wounds and this contusion on the ear; if the testimony showed that when the first shot was fired Hermes was standing, the second shot he was standing, partially leaning forward; the third shot that he reeled, or rather in a twisting fashion, turned and fell, with his back
136 to the general direction of Brown, who was firing the shot, and that as he fell on his back he supported himself on one or both arms, and appeared to be trying to get up, and talking to Brown, and then there was a fourth shot fired, and he immediately relaxed, and went back flat on the ground; which shot would you say was it, the first, second, third, or fourth, that severed the thoracic aorta?

Mr. Dougherty: Without repeating all of our objections, we renew them.

Court: I overrule them.

Mr. Dougherty: Note our exception.

Witness (continuing) :

In my opinion, under these conditions, it would be the last *show* [shot] that was fired that severed the aorta; because, as I said before, that a man would die instantly, and not be able to support himself after the aorta had been severed; that is the only reason. The blood in his heart and brain emptied itself into the cavity of the thorax, and possibly into the abdomen; just simply an emptying of the entire blood system through this severance of the aorta. There can be no stimulation of the brain without blood, and as soon as it was depleted of blood, a man would be unconscious, and in a case of severance of the aorta, that would be practically instantaneous; as soon as it was severed the body would be practically emptied of blood. The aorta is a vessel a half inch in diameter I should judge.

Cross-examination :

With regard to the course of the shots making the two wounds described as superficial, they struck in the upper part of
137 the chest, and one went in this direction (illustrating) to the point of the shoulder, and the other one around this (illustrating) way, and back a little into the armpit. I could not say whether these two shots were more likely to have been fired by a right or left-handed man, because it would depend entirely upon the angle in which the man stood that was being shot. If he was standing directly in front of the man who was doing the shooting neither the right nor the left hand could have fired the shots; the left hand would have been the more likely one to have inflicted these wounds. As to the wound in the left femur; the upper part of the thigh, the course of that was back, and very slightly downward; that wound was practically at right angles to his leg, except for the slight deflection downward. It was almost a straight-in wound. It was substantially perpendicular to the leg. The wound produced a complete fracture of the femur; I mean by this that the femur was broken completely. I could not say whether the fracture completely destroyed his power of locomotion; if it was what we call an "Impacted" fracture, the weight of his body on that leg would possibly kink or dovetail the two fragments. We did not test to ascertain whether this was or was not an impacted fracture; so far as we examined the fracture was complete, we lifted the leg back and forth; we did not find that it was impacted, it rather indicated a complete fracture. He could not have walked with his leg in that condition, unless the fracture was an impacted one; after death the muscles are all relaxed, and they would not be pulling up on the leg, as they would with a person alive. With reference to the aorta, that is an artery running right down from the heart, practically parallel to the breast bone; that portion of it above the diaphragm is the thoracic aorta, that portion which is in the thorax; I mean by the thorax the chest cavity; the aorta extends on down into the abdomen, and becomes the abdominal aorta; it is about one-half inch in diameter I should judge. I examined the

138 aorta to see if it was severed, with my finger, I could insert my finger in the end of it. The shot severed the aorta entirely; the aorta in that position is placed directly in front of the spinal column, against the bone, and I judge that the bullet struck that and mashed it against the backbone; I put my finger in there, and there was no part of the upper and the lower pieces of the aorta remaining in contact. Death by severance of the aorta results from hemorrhage, the party remains alive until a great volume of blood is discharged, then he dies; the volume of blood in a man's body would determine more or less the period of time that would be involved in his dying, after a severance of the aorta, and the resulting hemorrhage; there is therefore no fixed and determinate rule that would govern all cases; there would necessarily be in each individual case, a variance in time, dependent upon the volume of blood. If the discharge of this blood through the aorta into the thoracic cavity took a longer period of time in one individual than in another, the man would continue to live until there was a great discharge and one man would live longer than another under the same circumstances. Men shot through the heart sometimes live for quite a period. In making my statements here as to the period of time that would have elapsed after the shot, until the death of Mr. Hermes, my statements and conclusions are based upon the proposition as to the period of time that would be required for the discharge of the volume of blood.

Q. There is one further demonstration which I desire to make Doctor. The wound in the leg, Doctor, as you have indicated to the jury was practically at right angles, and immediately backward; I will ask you if two men stood up, one with a pistol in his left hand, and fired the shot, in what attitude would he have been compelled to get, in order to have fired the shot that penetrated and went through the leg?

Mr. Green: Your Honor, I do not think that is expert testimony; this Doctor has not qualified as an expert pistol shot.

139 Court: I have not heard any testimony that this pistol was in his left hand.

Mr. Dougherty: I will eliminate that, I will assume that it is in either hand. Say that the man using the pistol was some six feet; I believe that is in evidence; and the deceased. You knew Hermes, did you not?

A. Yes, sir; and Mr. Brown.

Q. In what attitude would Mr. Brown have to have been, if he had shot Mr. Hermes through the leg here before Mr. Hermes fell?

Mr. Green: Now, Your Honor, I submit that is not an hypothetical question, it calls for a conclusion, and the witness has not qualified as an expert on pistols.

Court: You are asking the witness to state, and you really complete the hypothesis.

Mr. Dougherty: I state, here is a bullet that he knows the angle of.

Court: Are you asking him about the angle?

Mr. Dougherty: He has already testified about that. I am asking

him in what position would his adversary have to have been at the time he fired the shot, if at the time that this shot in the leg hit Hermes, Hermes was standing up, and his adversary standing up. In order to make clear my position; it is evident that they seek to show that that shot that penetrated his leg was fired while Mr. Hermes and Mr. Brown were standing up. Now I have a right to show, I take it, particularly in the light of the testimony
140 just introduced, and the hypothetical questions asked as to the attitude and position, that they would have had to have been in, in order for that shot to have penetrated him there in that method.

Mr. Green: We take it that that is matter of argument, and not a matter of expert opinion; it is not a question for expert opinion as to what position he would have to have been in, in order to inflict that kind of wound.

Court: He has followed the course of these bullets, and this cross-examination can go into his opinion as to the position or the distance at which those bullets were fired, and the angles. I overrule the objection.

Witness (Continuing): It would be impossible for me to say what positions men of the size of Brown and Hermes would have to be in, in order for this bullet wound in the thigh to take the course described, if they were both standing up when the shot was fired, because after a bullet strikes anything, it is impossible to say what direction it will take, even through soft tissues.

Q. Assuming that there was no deflection of the shot, Doctor, the course that the wound took from the point of entry to the bone, was that as you state here?

Mr. Green: Your Honor, there is no testimony on which to base that; we can't assume that there was no deflection.

Court: No.

Mr. Dougherty: I have stated the proposition that I have in mind.

141 Court: He testified as to the direction of the shot after it penetrated the leg.

Mr. Dougherty: There is no evidence that it was deflected, and assuming that there was no deflection.

Court: But the witness has testified that it is impossible to say.

Mr. Dougherty: I asked him as to the course of the bullet, from its point of entry, at the skin, to the femur; if you will permit me, I will ask him another question?

Witness (Continuing):

The course of the bullet, from the point of entry on the surface of the skin, to the femur, was the course that I have indicated here, beyond that it struck the bone. I could not say whether or not it continued in the same course after striking the bone, we did not locate the ball, we did not probe through the bone. From the skin to the bone there was a definite course. As to the position in which the men would have to have been standing when the shot was fired,

taking into consideration only the course of the bullet before it struck the bone and leaving out the question of deflection, the angle would be self-evident. It would depend on whether the leg was advanced or drawn back; if the leg was back (Illustrating), and a man shot on a horizontal plane, the bullet's course would naturally be slightly downward; otherwise, the range of the bullet would have been a little downward, provided there was no deflection. In other words, if he had his leg backwards, as you have there (Referring to illustrative position of counsel), the pistol would have had to have been held

practically on a horizontal plane in order to have taken the
142 course that it did. The angle of the pistol would depend greatly upon the distance the two men were apart; it would depend upon the distance, but it would have to be held substantially in a horizontal position. It would make some difference in the angles if the man were standing erect; but the pistol would have to be held in practically the same position, perhaps a little higher. With reference to the shot that penetrated the aorta; ranging slightly downward also, that went through the abdominal wall or diaphragm here (Illustrating), we followed it no further, but from the course, it went about one-half inch to the left of the spine. A man could not have fired such a shot with this course, to the left from the right hand side of the body of the deceased, and at his feet; unless the bullet was deflected after striking a rib. We found no evidence of this, the rib was not broken; I could not say whether there was any deflection, there would be no way to tell. The course of the bullet from the point of entry to where it penetrated the diaphragm was not a straight line; it struck the aorta, was then deflected, and then entered the abdominal cavity; the direction from the skin, pointing to the place where it struck the aorta, would be described as being backward, and very slightly downward, considering that there was just an inch difference at the point of entry, to the backbone. The aorta is the largest artery. The wall of it is a membrane. We did not follow the bullet on; down into the abdomen, but the general course of the whole thing was slightly downward and inward, to the left of the spine.

Redirect examination:

I stated that there might be a variance in individual cases, in the length of time required to drain the blood from the brain and the heart, in the case of a severance of the aorta, but this variance would probably not be more than two or three or four seconds. It is possible that a man shot through the heart might live longer than

a man who had been shot as Mr. Hermes was in this case;
143 the aorta being severed. I will explain my reasons, the aorta is a blood vessel, it consists of three coats, an internal coat, and then a muscular coat, and then a serous coat on the outside; the thickness of the walls in the case of the aorta is between 1-16th and 1-32nd of an inch; when arteries are empty they have a tendency to contract down; they have a thin coat of muscular tissue; the heart is all muscle, a very thick muscle, and when it receives a pistol shot

it contracts upon the wound received; that is the only reason I know why a person would be able to live after a heart wound, on account of the power of contracting of the heart muscle temporarily closing up the wound; the thoracic aorta has not this power in the same degree as the heart; it is very differently constructed, and there would be practically no possibility of its contracting down upon itself. As to the angle from which the bullet may have been fired that broke the bone in the left leg, if the two men had been standing erect, that angle would have been a little above the horizontal.

Q. Now suppose that at the time that last wound; the one that you describe as the fourth in your post mortem, was received. I mean by that in reference to your examination, without any reference to when it was actually received, but in your post mortem——

Mr. Dougherty: We object to him stating when the fourth wound was.

Mr. Green: He simply says in his post-mortem, "A," "B," "C," and "D." I am not asking him that. I will reform the question.

Q. In your post-mortem you described the wounds, "A," "B," "C," and "D," do you not?

A. Yes, sir.

Q. Now the one that you describe as "D" is the one to which I am directing your attention; the one that severed the thoracic aorta? Would it be possible for that wound to have been
144 received if the deceased was lying on the ground, raised on his elbow, his right elbow, or arm, and slightly twisted towards the defendant who was standing on his right side; and twisting, and attempting to raise himself?

Mr. Dougherty: We renew the objection that we made before.

Court: Redirect examination refers to matters brought out on the cross.

Mr. Dougherty: You will recall that it was invading the province of the jury, it was a matter peculiarly within the province of the jury to determine, the location of the parties and the course of the bullets; it was a matter for the jury, and not a matter for expert testimony.

Court: This would not be binding upon the jury; it is merely the opinion of the expert as to the course of the bullets.

Mr. Green: I did not attempt to show any of this testimony on direct examination; it is only after counsel attempted to show the course of bullets, and where the defendant might have been standing that I offered it on redirect to his cross.

Court: I will permit it.

Mr. Dougherty: Note our exceptions, Your Honor.

Witness (Continuing): It would be hard to answer that question, on account of the deflection. The bullet would naturally have to be deflected if the party was standing on the
145 right side. It would have to become deflected a little, unless he was leaning over and pointing the pistol a little towards the right; necessarily so.

Q. Suppose he was standing over him, on the right, and pointing the pistol down in that direction? (Illustrating.)

Mr. Dougherty: What direction?

Mr. Green: From right to left, the other man twisting rather toward him in an effort to raise himself.

A. In that case I think the wound could have been made that way.

Q. If that wound, which you describe in your statement of the post-mortem examination as "D," had been received before Herms fell to the ground; would it have been possible for him, in view of the physical results from the effect of that bullet, to have been moving himself, or twisting and speaking?

Mr. Dougherty: We renew our objections, Your Honor.

Court: I overrule the objections.

Mr. Dougherty: Note our exceptions.

Witness (Continuing): No, sir, he could not.

Re-examination:

I have never seen such a case prior to this time; I have never actually been present at the time of the severance of a man's
146 aorta. My reply to Mr. Green's question as to whether it was possible for a man to have made these movements after the severance of the aorta is based solely upon the theory of the death resulting from hemorrhage and shock; in the normal person, physiology teaches, that the blood makes a complete circulation of the body in 30 seconds; now with a very large wound, it would naturally be supposed that the blood vessels would empty themselves in that time; as to the exact number of seconds required to deplete the brain, it would be impossible to state; it would be sometime within thirty seconds. With reference to the course of the bullet wound that penetrated to the right of the breast bone, severing the aorta and ranging back to the left of the spine, if the man firing that shot stood to the right of the deceased, he would have had to have gotten over and held his pistol at an angle, bent slightly backward towards himself. Whether or not such a wound could be inflicted by a man standing on the right and slightly at the feet of the deceased; or at his feet; would depend upon his position on the ground. If he were lying perfectly flat; with his assailant to his right, the bullet would have to be deflected after hitting the skin, to take the course that it did.

Government rests.

Defendant's Case.

JOHN S. FENNER, a witness for the Defendant, being called, testified:

Direct examination.

Having examined the map or plat of the portion of the town of Beville under consideration, I state that it was made by me. It is approximately correct. The sizes of the buildings are of course mere guess work, as to their location they are correct.

The sizes of the street and the blocks are as to scale. I am familiar with the topography of the streets and the condition of the ground. I have made a survey of that part of the city as an engineer. This black spot here indicates where the body was found.

Q. Just one thing. Have you in putting in that dump; have you done this to distance, or just roughly?

A. Just from memory; the only thing that I took any measurements on was this, (Illustrating on map) based on a straight line from here to here, and then from this line over to where the body lay, and to about the crest of that mound there, which is about four feet from the property line. The absolute length and breadth of the dirt, I have nothing on that.

Q. I will ask you, as to your general recollection is that dump, or was it, somewhat longer than that at the time of the homicide?

A. It was probably in the neighborhood of halfway up that property line; they at one time I think had dirt way down here, but they had hauled a great deal of that dirt away at the time of the homicide, so I am unable to see just how long it was.

Q. What street is this that lies to the North of this property; do you know the number of this block?

A. Block No. 37, yes, sir.

Q. Please put it on that sketch?

A. (Witness marks sketch.)

Q. Which is termed the North side of the block?

A. This side. (Illustrating.)

Q. The south side?

A. This side. (Illustrating.)

Q. Would you mind noting there the general designation of the cardinal points with reference to that block. You have it up there, but that is the true North?

A. No, sir, I just put it on there approximately.

Q. Bowie Street is spoken of as the North side of the block?

A. Yes, sir.

Q. And Corpus Christi Street as the South side?

A. Yes, sir.

Q. And St. Marys as the East?

A. Yes, sir.

Q. And Washington Street as the West side?

A. Yes, sir.

Bowie Street is 60 feet wide, the alley 20 feet, and Washington Street 60 feet wide. Right here is the passenger, and here is the freight depot of the S. A. & A. P. Ry. The little building North of the depot is the Express Office. Nutt's Tailor Shop is here. The railroad runs on the western boundary of this tier of blocks, and they are using this in here as a street. They use it all the time. I have marked here Krueger's Hardware Store. Mr. Walslager is a member of the firm. There is a building in the rear of that used as a warehouse. I can only indicate where that building is by saying it is in the rear. I should imagine it is about 15 or 20 feet from the end of the store to the entrance of the warehouse. I have nothing definite as to the length of the Kurger Hardware Store. My best guess is that it is about one-half the distance across the block. From the back part of this building if it be 70 feet it would be about 95 feet or 100 feet to the crest of the dump. At this point his sketch was offered in evidence, and marked Exhibit 11.

J. A. DOUGHTY, a witness for the Defendant, testified as follows:

Direct examination:

My name is J. A. Doughty. I have been living at Beeville for a good while, until early this Fall I went to the ranch, out in the northwest portion of Duval County, about three miles from San Diego. I am 61 years old. I knew Jim Hermis in his life time. I think the best I can recollect something like 15 years, I know

Mr. Bob Brown. I suppose I have known him something
149 like 15 years. My relations with Mr. Hermis were friendly.

My relations with Mr. Brown were the same, friendly.

I was at the scene of the difficulty that resulted in the death of Mr. Hermis on May 7th, 1917. I happened to be idle, and had no work in my line, and I went around over there where the men were working. My line of work was windmill and water supply work. I was down in the basement there where they were putting in some concrete, and I was on the East side of it; in the pit. I was very few feet from the East side of the pit. I do not suppose I was more than 4 or 5 feet. From where I was standing I had a view of the dump. The dump was West. I had a view of the whole dump, except a little at one end where there was some cagons. That was the North end. The first I saw of the difficulty I heard some one say it sounded to me like "Stop." I looked up and saw them on the dump. It seemed to me that Mr. Brown made the statement "Stop." At the time I saw them Mr. Hermis was getting up on the dump when I first saw him. Mr. Brown was up on the dump. The next thing I saw Mr. Brown was backing off. He was backing a good deal in the direction, and a little to the South of where I saw, backing sort of up in that direction, only a little south. He was on the dump. He backed several feet, and Mr. Hermis was crowding him, and striking as I thought with a knife from theicks he was making. Mr. Brown was backing until he came to where his gun was on the dump, and he picked that up and kept backing. His gun was in

a slicker. To get it out, he grabbed up the slicker and unrolled it. He commenced shooting then and Hermis was crowding him closer. I could not tell how close they were together at the third shot exactly, but they were pretty close together, looked to me to be mighty close together. After the third shot, there was a fourth shot, and then Mr. Hermis fell, and Mr. Brown walked off. I never heard any conversation between Mr. Brown and Sol Miller after that shooting. I heard him, Brown say, "What in the world did you
150 bring him here for?" or words just about similar to that. I could not tell just exactly what effect the third shot had more than some of the other shots. It looked like Mr. Hermis started falling about the third shot, just a second afterwards the best I could tell. He fell sort of to this side, and went down on his back like. I did not see Mr. Brown fire the fourth shot, because he was directly between me and Mr. Hermis. Hermis, it looked like, was passing that way as he started to fall, and Mr. Brown started to move this way like, and was right between me and Mr. Hermis. When I saw Mr. Hermis come up on the dump, pretty close to the North end, the best I could tell a few feet from the North end of the dump. Being right on the other side of Mr. Brown from him, I could not tell how far Mr. Brown was from Mr. Hermis when Mr. Hermis got up on the dump, but he was a few feet away. At that time Brown was backing off from him, he had not gotten his gun at that time. I saw Brown when he stopped to get his gun. At that time Hermis crowded up pretty close and made a motion like he was cutting at him. Mr. Brown retreated from where he got his gun to where Mr. Hermis finally fell, at least 18 or 20 feet.

Cross-examination:

I say that Hermis had his hands up like he was cutting at Brown with a knife. He made several licks. That was when the first shot was fired, and I think maybe before the first shot. I did not see any knife. I was not close enough. I was some 85 or 90 feet from him. Hermis kept striking pretty often. I suppose he did not reach Brown with any of them. I could not tell how far he was from him at the second shot, he was pretty close. Nearly close enough to strike him, but it looked like he did not strike him. I could not tell you whether he was as close at the second as the first shot. Hermis' position, after the first shot, looked to be the same until the last.

151 He was striking all the time until about the time he began to fall. Every time he was in reach it looked like he would strike, but as to how many times I could not tell. I then saw him fall. He sort of turned as he fell, and came right back. He was not striking at Brown while lying on the ground. I did not say he was on his back. I said when he fell, he fell back that way. (Illustrating.) He sort of turned that way and went down. The best I could tell he went back on his arms. Brown did not shoot him after he was on the ground. The best I could tell, when the fourth shot was fired, was about the time when Hermis started to fall.

Q. Don't you know Mr. Doughty, when he fell there on the

ground, that Mr. Brown looked at him and walked around him, and fired another shot, and said, "Damn you, I'll give you another one"? Do you not know that?

A. No, sir, I don't.

I do not know that Mr. Brown hit Hermis across the side of the head. He might have struck him, and I not seen him. There was a bruised place across the side of Hermis' head. I don't know that it was put there by the six-shooter in the hands of the defendant as he was falling down. I won't say that it was not, but I never saw it. The best I could tell, I have told you, as to the position Hermis was in when the fourth shot was fired, as near as I could tell the last shot was as he started to fall. It was pretty soon after the third shot, right quick. I could not tell exactly how far he was from the ground. When he started to fall he just turned and went right down on his back and caught with his elbow. When the third shot was fired Hermis and Brown were facing each other. When he started to fall, he did not fall in Brown's direction. The best I could tell, Mr. Brown stepped back in my direction, and Mr. Hermis fell that way on the other side of Brown from me. The way I saw it, Hermis did not fall from or toward Brown. Brown was standing this way (Illustrating) and Hermis fell that way, across sorter. Hermis' back was a little that way, somewhat to Brown. At the time I do not consider there was anybody with me. Mr. Flemings was down in there getting some timber to make some casing for some concrete work. There was nobody with me.

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Redirect examination:

Mr. Clements had been there with me. He went up in the back, I think for some more planks. I never saw Mr. Brown strike Mr. Hermis while he was on the ground. I never heard Mr. Brown say to Mr. Hermis, "Damn you I will give you another one." I never heard him say, "I will give you another one."

Recross-examination:

I am sixty-one years old, if my father's record is correct.

IKE ARCHER, a witness for Defendant, testified:

Direct examination:

My name is Ike Archer. I live in Beeville. I knew Mr. Hermis in life time. I have known him ever since I lived in Beeville, about twelve years. I remember when they started to build the postoffice at Beeville, and started the excavation. I remember the time of transferring some person's households good- there along about that time or before then. I was working for Mr. Robert Brown at that time. I have worked for Mrs. Hermis since the death of Mr. Jim Hermis. I had a conversation with Mr. Hermis there one Sunday soon before the beginning of this excavation. I was coming out of the city one Sunday, me and my wife. I went around by Mr.

Berry's, and Mr. Hermis waited on the corner and met me, and said "Hello Nigger," and he walked on down toward the ice plant, and I was on the walk holding my little colt eating grass, and he said, "You know, Ike, that boy of Bob Brown's liked to have run
153 into me the other day." I said "Yes." He said, "Don't you think that Bob put him up to it?" I said, "Mr. Hermis, Mr. Brown didn't know that his boy—." (Witness interrupted.) Well, he says to me, "This boy was coming down the street with his automobile, and he liked to have run into my mules," that he did not know whose boy he was until he had passed him, and Mr. Miller said it was Mr. Brown's boy, Leonard. Mr. Hermis said that he believed Mr. Brown put the boy up to do this, that him and Mr. Brown had had a row, and Brown would not fight him when he had his knife, and he said Bob was going to ask him to throw away his knife, if they had another difficulty, and he was going to throw one away, but the other one he was going to keep it, which was the bigger one, and the little one he showed me, the one he was going to throw away, and the big knife he was going to put up his sleeve. He said he was going to use the knife on Brown. That is part of it, but you all won't let me tell the conversation like I heard it. I was sitting on the side walk, and he said, "See here, nigger," and he showed me the knife. I don't know what sort of of knife it was, I did not pay any attention to it. He said he was going to put his knife up his sleeve. I do not know how many knives Mr. Hermis ordinarily carried. On that day he had two knives. He had one little knife and a big knife. I do not know what sort of knife the big knife was. I told Johnnie Ruebush about this. It was done on Friday and I told Johnnie on Monday. I was hauling dirt all the morning on the day of the homicide, back and forth. Mr. Sol Miller was taking the dirt on the outside next to the alley, and Mr. Brown was taking it next to the building.

A. He was taking the dirt there along across this way (Illustrating.) Mr. Brown had some more hands taking the dirt, and I was driving the wagon, hauling and pulling with the mules that I was driving, and I drove up and took up dirt and loaded my wagon, that is all I know of this, and as near as I can come to telling it, we all
154 loaded right there, and Mr. Miller and Mr. Hoolihan loaded on that side until we got up to a narrow point, nearly to the post, maybe about five or ten steps from the post. I did not measure the distance, but getting in pretty close to the post, they cut through the dirt, that way, and the dirt came through together, just that way (Illustrating): there was a little pile lying there, and some over here; the boys in taking up the dirt they went through the pile, and I drove up, because it was my load there, and it was on Mr. Miller's side; just a small pile of dirt, and stops my wagon, and started to pick it up, and the boss says: "Drive up here," and I drove on up, and we loaded, and I drove off; and Mr. Miller says something. "Well, Ike, we are hauling dirt," and he shook his head at me, that way; just shook his head, that was all he said, that was all in the world he said to me.

The black dirt was on the lower end of the dump, on the south

end of the dump. The clay was on the north end. We were hauling clay. We were not hauling the black dirt, because the postmaster, Mr. Hare, said they wanted the black dirt for filling.

Cross-examination :

I have been working off and on for Mr. Brown for ten years, but at steady work I just commenced working for him two months ago the last time. Before that I was farming. I feel friendly to him. Mr. Hermis knew I had been working off and on for Brown for ten years. He did not look me up. He told me what he was going to do to Mr. Brown. Mr. Hermis stopped and waited, and said "Nigger." He walked along with me, down the street. It is my idea, and Mr. Hermis told me, that he was going to try to take advantage of Mr. Brown by throwing one knife away, and making him think he did not have any knife. He said "He was going to throw this knife away, and have the other up his sleeve." He told me this, knowing that I had been in Brown's employ for ten years. He did not say when he was going to do this. I don't know what kind
155 of knife it was, or how many blades it had. He showed me the knife, and showed how he was going to do it. I do not know how long it was before the killing. It was about a month. It was a good while. It may have been two months, it was before they commenced the excavation. Yes, sir, it must have been more than a month. They had dug all that pit there, we had finished it. I do not know how long it was. Hermis told me on Sunday, and I told Mr. Johnnie Ruebush on Monday. I said we moved some people on Friday, and I told Mr. Johnnie Ruebush on Monday. I never did tell Mr. Brown. Mr. Miller said nothing to me on the day I was hauling dirt. He said, "Ike, we are hauling dirt," and shook his head. He must have shook it at me. I don't know what he meant. I did like any other nigger would do, looked at him and laughed and then moved off. The electric light pole must have been on the East side of the lot. The sun "set" over there on that side. I mean in the West.

Redirect examination :

The people we spoke about hauling on Friday were Mr. Frels.

VICTOR GABEO, a witness for Defendant, testified :

Direct examination :

My name is Victor Gabeco. I live at Beeville. I was born in 1900. I was working for Mr. Brown in May 1917. I am a Mexican. I remember the day Mr. Hermis was killed, May 7th, 1917. I remember when he was killed. I was working with Mr. Brown. We were putting dirt on the wagon. I saw Mr. Sol Miller and Jim Hermis drive up there in a wagon. Mr. Brown was standing on the top of the dirt at the time they drove up. He was not very far from the telegraph pole. Mr. Brown was looking at us working. I

156 heard Mr. Brown speak to Mr. Miller when he came up. He told Mr. Miller not to take that black dirt, to go and get that white dirt, that they were getting first. At that time Hermis was sitting down on the wagon. Mr. Hermis jumped off the wagon, and came and told Mr. Brown that he was not the boss of those men. "God damn it, you are not the boss of these men." (Interpreter, "This job, he says now.") Mr. Hermis went toward Mr. Brown and Mr. Brown went back to where his rubber coat was. While Mr. Brown was going backward to where his rubber coat was Mr. Hermis was following. When Mr. Brown got to his coat, that was when he got his pistol. I heard Mr. Miller say to Mr. Hermis, when Hermis was going along toward Brown, to go to it. Sol Miller said, "Go to him, Mr. Jim." He said that twice. After Mr. Brown got his gun Mr. Hermis was going toward Mr. Brown, and Mr. Brown was backing up. Mr. Brown shot. He shot four shots, but I only saw two. The two first ones. At the first shot Mr. Hermis was coming toward Mr. Brown and at the second shot I got scared and went up to a pile of dirt which I had been throwing in a wagon. I got behind the pile of dirt where I was taking dirt and I didn't see any other shots. I saw the first two shots.

Cross-examination:

Mr. Brown's slicker coat was lying on the dump. I never noticed it lying on the dump there for several days, no, sir. I do not know that it has been there on the dump two or three days the last week. The first time I noticed it there was when I came from dinner. I do not remember whether it was clouded that day. I never saw Mr. Brown when he brought it and put it there. I do not know that it was a rainy day. It was not muddy. It rained that week. It was not muddy on the dump. There had been no rain that day. When I came from dinner I saw the slicker. I did not see the gun. I did not know before that it was in it. It was hidden from view.
 157 covered up so that it could not be seen, because it was wrapped up in a slicker. I do not know how far I was from Mr. Brown when the shooting occurred, about from here to that table, a little further maybe. I have talked with Mr. Jim Dougherty about the case. I talked to him the same day that the killing occurred. I went myself to him. Johnnie Ruebush told me the lawyer wanted to talk to me, and I then went up to Mr. Jim Dougherty's office.

DIEGO RODRIGUEZ, a witness for the Defendant, testified:

Direct examination:

My name is Diego Rodriguez. I need an interpreter. I was working for Mr. Robert Brown at the time Jim Hermis was killed. I knew Mr. Hermis. I did not see Mr. Hermis on the day he was killed, at the place where they were taking the dirt. I did see him at the time of the killing when he came there. When Mr. Hermis got there I was loading a wagon. I was behind the wagon, between the wagon and the dump. I was loading on my left, leaving the

dump on the right. I saw Mr. Bob Brown at the time the wagon drove up with Hermis and Miller in it. Brown was on the dump. I heard Mr. Brown say to Miller, to drive up ahead to get the dirt from ahead. Mr. Hermis said to Mr. Brown and told him that he was not the boss of that work. Hermis then jumped from the wagon and went from behind. Went around behind. Mr. Brown, when Hermis jumped from the wagon and went behind, went back to where he had his coat. Mr. Hermis went toward him. Mr. Brown went backwards to where his coat was, and Mr. Hermis went toward him, trying to catch him. Mr. Brown got up to where his coat was, but I do not know where he got the pistol from, if he got it from his coat or where. I heard Sol Miller say to Mr. Hermis, "Go to him,

Jim." I heard that said about three or four times. That
 158 is what I heard him say to Jim when he was going after Mr. Brown. When the first shot was fired I got behind the wagon, and was there when the second shot was fired. I had had my shovel in my hands, but I put it on to the ground, I was sorter scared that they might shoot me. I got behind the wagon. I heard three shots only.

Cross-examination :

That was the first day I started to work for Brown. I knew Mr. Brown before, and had worked for him before, for a long time before. The last time I worked for him was about five or six months, and I had worked for him at other times before that. I do not remember when Mr. Brennerman, the Government man was over there interviewing witnesses in this case, a tall man. I have not talked to any person who wanted to know my testimony in behalf of the Government. I have not talked to any person except Mr. Dougherty, that was the first day that this case happened. I do not remember who told me to go to his office. It is not a fact that after that time I refused to talk to any person for the Government to give any testimony in this case for the Government. I did not state that I heard the shots, but did not hear any conversation. What I said was what I have just finished saying here, and that is all I heard. Mr. Brown told Mr. Hermis, when Mr. Hermis was going up, not to get mad. He did not tell him that he was going after the gun, he was standing right in front. The Government agents have not asked me about this, except the lawyer. I told Mr. Dougherty that. I have told him everything. I did not hear Mr. Brown on that day curse Mr. Hermis, and call him a son-of-a-bitch, not a word of cursing. I never heard Mr. Brown say to him, "You son-of-a-bitch, you can't get any of this dirt." I did not hear anything of that kind. All that Mr. Brown did was to tell Mr. Hermis to drive up a little further, and Hermis came out and jumped on him. That is the way I want the
 159 jury to understand it. He jumped and went behind the wagon. He jumped from the wagon, and came around from behind the wagon. Hermis ran up over the dump toward Mr. Brown. He was talking fast. He was close to Mr. Brown, when Mr. Brown shot him. As close as from here to you and me. (From witness stand to table in court room, from 8 to 10 feet). Hermis

was close enough to Brown for Hermis to touch Brown. He did *did* not hit him. Hermis was close enough to hit him, if he had wanted to. I did not see him hit him, I did not see him cut him, I did not see him shoot him, and then Mr. Brown stepped back and got the gun out of the slicker. When he was standing there close enough to hit him Mr. Brown had his gun in his hand. When Mr. Brown shot Mr. Hermis, Mr. Hermis was trying to catch his pistol.

I am not sure he was trying to catch his pistol, but he was trying to get his hand. I did not see anything in Hermis' hand.

Redirect examination :

When Mr. Hermis was on the dump going toward Mr. Brown, I was in front of the wagon and of the dead man, in front of the single-trees. I was looking South toward the way Mr. Brown was retreating, and Mr. Hermis going. I saw the first shot and then got behind the wagon. I heard the first, second and third. There was nothing to prevent me from seeing them. There was nothing in front of me, just the wagon where I was standing.

Mr. Green : Did you not state a while ago that you saw the first shot?

A. I heard the first shot ; that is what I said a while ago.

Mr. Green : You did not see any of the shots then?

160 A. No, sir, I did not see any, because I did not see the dead man.

Mr. Green : Did you not say that you saw the first, and that you got behind the pile of dirt and heard the second?

A. That I heard it ; that I heard it.

HOMER LEE MCKINNEY, a witness for the defendant, testified :

Direct examination :

My name is Homer Lee McKinney. I live in Beeville. Have lived there about 25 years. I was in Beeville of the day of the killing of Mr. Jim Hermis. I was at the scene of the homicide immediately after the killing. I saw Mr. Joe Thornton there. He is sheriff. He was summoning witnesses for an examination trial I believe. I went over to speak to Mr. Thornton. I called his attention to a slicker that was lying there on the dirt, that was thrown out of the basement of the postoffice building, and also a coat. While I was there I saw Mr. Sol Miller. He came up to where Mr. Thornton was. I was standing with Mr. Thornton, and then he came up. He came to see him, Mr. Thornton, not me. Mr. Sol Miller said to Mr. Thornton : "Mr. Thornton, Paul Perkins, knows how come me with Jim Hermis' knife." He said that in my presence. He made no further explanation of it. When Sol Miller made this statement to Mr. Thornton, Thornton was going toward the court house at the time, and I do not know that he said a word to him. If he did I did not hear him.

Cross-examination :

I did not see any of the shots that were fired. I was in the meat market, about 150 yards away when it commenced. I should think it was something like ten minutes after the shot when I heard
 161 this conversation. I saw the sheriff about 18 or 20 steps east of where Mr. Hermis was lying. It was between the undertaker's shop and where Mr. Hermis was lying. The sheriff had been summoning Mr. Miller, the postoffice building inspector, and also the man that was building the postoffice, and had started to the courthouse. He was not going away from where Mr. Hermis was. Sol Miller just came up and told the sheriff that. The sheriff had not said anything to Mr. Miller before that I know of. Sol Miller came up while I was talking to Mr. Thornton. I think the sheriff told some of the negroes that was working for Brown to take the slicker home for him. He did not get it himself.

WILL NUTT, a witness for the defendant, testified :

Direct examination :

My name is J. W. Nutt. I am deputy sheriff. Have been such for 18 or 20 years. I saw Mr. Brown's pistol after the homicide. Mr. Thornton asked me to go over to the Midway Saloon and get it. There was one load in the pistol. It was a Colt's gun, probably a 41. There remained a load in it at that time.

Cross-examination :

The gun was a six-shooter.

Q. I will ask you; I have *a* drawn a circle here in the shape of a cylinder with six small circles, or imitations or circles (they are not exactly perfect) to represent the chambers of the pistol. Now I will ask you to indicate on there as you saw the pistol at that time, the order; Where those that were shot are, put "S;" on those that had been shot; and "L" for the one that was loaded?

Witness marks diagram.

162 Q. How many were shot?

A. Four shot, and one empty, and one loaded.

Q. Without trying to show whether the one that was loaded at the top; but with reference to the other chambers; show the relative position of those that were loaded and the one that was empty, and the ones that were shot?

A. How do you want me to mark it?

Q. Mark the empty one "E."

Witness marks diagram.

Q. You have marked the one that was loaded, and the ones that were shot?

A. Yes, sir.

(Diagram shown to the jury, though no formal offer of same in evidence was made; attached hereto, marked Exhibit No. 8).

It is customary to carry a gun on an empty sometimes. Some carry them loaded all around and some on an empty. That is not out of the ordinary. To carry a gun on an empty means that the chamber that is not loaded is under the hammer, and when it is cocked that throws the load before the hammer.

Redirect examination:

I did not examine the cartridges after I got the gun to see the location of the various ones. I never moved the hammer until I turned it over to Mr. Thornton, and he examined it in my presence, and called my attention to it. I did not fix these letterings there on the diagram with reference to the top or bottom of the cylinder. I did not know what chamber the hammer was on at the time I brought the gun. Mr. Thornton was revolving the cylinder around when we looked at it. There was a loaded cartridge in the gun.

163 JOE THORNTON, a witness for the Defendant, testified:

Direct examination:

My name is Joe Thornton. I have lived in Beeville 30 years. I am sheriff, and have been a peace officer of Bee County for over 20 years. I knew Bob Brown and Jim Hermis in his life time. I knew them both well. Prior to the homicide I had occasion to go and talk to Mr. Hermis in the street near the back part of Reese's saloon. I met Hermis in the street. I had talked to him before about his and Brown's trouble, and tried to reason with him that the best thing to do was to quit before somebody got hurt, and he told me to go to hell, that it was none of my business. That was the first time he ever talked mad to me about it, but I had talked to him several times before that. That was about all he said, he walked off one way and I another. The second meeting I came from home and met Mr. Hermis on his wagon, coming from the depot. I was going to the depot and I asked him if he and Brown were having more trouble, and he told me they had had, but it was over. Mr. Hermis said he did not want to make friends "With the damned cowardly son-of-a-bitch." He exhibited a weapon at the time. I have seen Mr. Hermis with two knives several times. One was a large one bladed Barlow, and the other was an ordinary pocket knife.

Q. At the time of the decease of Mr. Hermis did you secure the knives that were on his person at the time?

A. I got two knives from the undertaker, Mr. Walker.

Q. Have you those knives with you?

A. No, sir, I turned them over to Mr. Brennerman who represented himself as a Federal officer, and took his receipt for them.

Q. Will you describe those two knives that you got and turned over to Mr. Brennerman?

164 A. That has been some little time ago; one of them was an ordinary pocket knife, and the other a small knife.

Mr. Green: I think it is immaterial unless it is shown here that they were used.

Court: Unless they were involved in the difficulty, I think so myself.

Mr. Dougherty: I can prove all of this by the next witnesses.

Mr. Green: I want it proved in order.

Mr. Dougherty: I am endeavoring to do so.

Mr. Green: It is inadmissible unless it is shown that these knives were used or attempted to be used in this difficulty.

Court: I think it is material to show whether the deceased was armed, because it is always material where self-defense comes in issue, to show the motive which prompted him in advancing, and I take it that the fact that he was armed is absolutely essential. Is it against any statute to carry a Barlow knife in this state.

(Here followed argument as to the admissibility or inadmissibility of the testimony above referred to; Court advises the jury that they are not to be influenced by statement of fact made in the argument, and makes the following ruling).

165 Court: I will sustain the objection.

Mr. Dougherty: Note our exception.

Court: If you can show the knife of the deceased in his hand or possession, or any evidence that he attempted to use a knife, then you can show that he was carrying it before.

I have the clothes of the deceased that were turned over to me by Mr. Walker, the undertaker. They have been in my possession ever since. I made an examination of the bullet holes in these clothes to a certain extent. I have the top shirt in my hands. At the time I got that top shirt, right here at this hole it was darker than it is now, and it smelt of burnt powder at the time. It was considerably darker at that time than it is now, and it smelt of burnt powder. I think it was the hole right in here over this pocket.

J. M. PICKETT, called in behalf of the defendant, testified:

Direct examination:

My name is J. M. Pickett. I live at Beeville. I lived there in May, 1917. I knew Mr. Jim Hermis at that time. I knew Mr. Rob Brown by sight, but if I ever spoke to him I do not remember it. A day or two before the homicide I met Mr. Hermis on Washington Street in Beeville. I walked up to where he was on Saturday morning before the homicide. When I walked up they were in a conversation, and someone called Rob Brown's name just as I walked up, and Mr. Hermis says: "Yes, I ought to have been around there to have cut his damned head off." That was all I heard. After this statement by Mr. Hermis was made a hearse passed by, before I walked up to them. I saw it pass

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just before I got to them, and Mr. Hermis said, that he did not know who was dead, and he says: "I guess it will be me next."

Cross-examination:

I have no occupation now. I am not able to work. Mr. Hermis was talking to Mr. Neel, the tailor. Mr. Hermis' son was there. There was some other man but I do not remember who he was. I heard the name of Bob Brown mentioned, and then he made this remark: I have talked to those lawyers there, Mr. Dougherty and his partner. I have never said but very little about it. I first told Mr. Dougherty. I did not tell him what it was, but I merely told him that if I was amind to tell what I heard I believe they would have me for a witness. He wanted me to tell in whose favor it would be, and I said in Brown's, and the next thing I knew the attorneys came out there to see me. Mr. Dougherty is the witness who is here, the old fellow with the bushy whiskers. I had spoken to Mr. Neel. I know him when I see him that is all. His shop is on Washington Street, about half way between the Beeville Trust Company Bank and the hotel.

Redirect examination:

This statement was made by Hermis on Saturday before the homicide, which occurred on Monday.

JOE THORNTON, recalled by defendant, testified as follows:

Direct examination:

After I had put Mr. Brown under arrest the condition of the palm of his right hand was powder burned. It was powder burnt
167 clear across there, about as wide as a man's finger. I got him water to wash it off. That was immediately after the homicide. I suppose it may have been five minutes after the homicide, hardly so long.

JOHN MURPHY, called in behalf of the Defendant, testified:

Direct examination:

Witness withdrawn temporarily.

AURELIO PADIO, called in behalf of the Defendant, testified:

Direct examination:

Q. Do you need an interpreter?

A. Si, Señor.

My name is Aurelio Padio. I live in Beeville. I am a soldier. I was in Beeville in May, 1917, and was at the postoffice site on the day Hermis was killed. I saw Mr. Bob Brown when Mr. Sol Miller drove up in the wagon. Mr. Brown was standing close to us where

we were working, I heard Mr. Brown say to Mr. Miller when he got there, he told him to get some dirt from ahead. Mr. Hermis said to Mr. Brown he was not the boss there. He said that he was not the boss there, that he had been bossing his work wagon all the morning. That is what he told Mr. Brown. Mr. Hermis did not say anything else, he just told him that, that he had been bossing his wagon all the morning, and then Mr. Brown backed up to where his coat was. I did not see Hermis do anything because I was working. I do not know whether Hermis — any place. I was working there, and when I saw both of them, both of them was on top of the dirt.

Brown went back to where his coat was.

168 Mr. Dougherty (resuming): What were they doing on the dump.

Answer by interpreter: He tells me that I ought to have said what he told me. He was asked what Mr. Brown was doing, and he said Brown went back to where his coat was.

I heard the man that came with the wagon, that was driving the wagon, say to Mr. Hermis, "Go to it." I think I heard it twice. He was talking to Mr. (I do not know what is his name). I think his name was Jim, because he said, "Go to it Jim. Go to it Jim."

Cross-examination:

I did not see any of the shots fired. I was standing way back there where the boys were, behind the other boys. I do not know how many feet I was from the man that had the gun; how can I tell you, I do not know. I understood what you said (referring to question of counsel put in English). I saw Brown pick up his slicker, but not his gun. I am in the army at San Antonio.

Q. When the officers called out, do they call in Spanish or English?

A. They blow whistle.

The man on the wagon did not say "Go to him Jim" in Spanish; he said "Go to him Jim." Brown went back there to his slicker and picked it up, and this man said "Go to him Jim," "Go to him Jim."

JOHN RUFUSH, called in behalf of the defendant, testified:

Direct examination:

My name is John Rufush. I live in Beeville. I was employed during the month of May by Robt. B. Brown in the transfer business. I had been working for him about seven years. My 169 duties were that I met trains, hauled trunks and got freight, and rustle business. I knew Mr. Jim Hermis ever since I have been in Beeville. I know Mr. Rufus Taylor, the agent of the S. A. & A. P. Ry. I have known him ever since I have been there. Mr. Taylor told me Friday night before it happened on Monday that Mr. Hermis was up at the depot talking to him, that Sol Miller had told him that Brown said that he could not get any more of that dirt, and that he wanted to see him about it, and Mr. Taylor said that he told him he was going to get in trouble about listening to

Sol Miller's tales. Taylor told me he had said that if he said any more about it to tell him and he would go down and fix Brown. He said he would fix Brown. I told Brown that. I think it was Saturday morning when I was riding down on the wagon that I told him.

Q. State whether or not you had a conversation with Ike Archer in regard to a threat?

A. Yes, sir, I did.

Q. What did Ike Archer tell you, if anything, in regard to the threat?

Mr. Green: We object, Ike Archer has testified.

Court: We sustain the objection.

Mr. Dougherty: Note our exception.

I told Mr. Brown that Archer told me the next time Hermis jumped on him and he asked him to throw away his knife, that he was going to throw his little knife down, and snatch his big knife out and cut him. I told Brown this about a week or ten days before it happened. Mr. Hermis directly communicated to me a threat. He jumped on me in a restaurant and shook a knife at me. I told

Mr. Brown that he shook a knife in my face, and Hermis
170 said that he had the change for me and Brown both. Prior to that at the Aransas Pass depot I heard Mr. Hermis make a statement about Mr. Brown. That was about a year I think before it happened. I told it to Mr. Brown. I told him that Hermis said the next time that he and Bob Brown had a fight that one or the other of them was going to take a black box. That was all Hermis said at that time. I heard him say one day in front of the depot about six or eight months before that that him and Bob Brown had a fight, and that Brown whipped him, and that he got his gun with the intention of killing Brown, but that one of his friends took his gun away from him. I am friendly to Mr. Brown. On the day of the difficulty I was hauling freight out of the Sap depot, at about 3 o'clock and 20 minutes. The train came in I think about 3:20. That was the north bound. I saw Mr. Hermis there at the depot. He was working the train as usual. I saw him after that. Sol Miller was hauling dirt, and him and Sol Miller was standing at the back of his wagon, and Hermis was nodding his head, and acting like—— (Witness interrupted.)

Mr. Green: We object.

Mr. Dougherty: State what his facial expression was?

A. I would judge he was mighty angry.

Court: Did you hear what he was saying?

A. No, sir, I did not.

Court: I do not think that the conclusion of the witness is proper testimony.

171 Mr. Dougherty: Note our exception.

Mr. Hermis was a good little piece from me, about 40 or 50 yards. I have seen Mr. Hermis when he was angry before that.

He looked like he was mad to me. That is all I can tell you. While this conversation was going on, they were standing right at the end of the Sap depot, close to the front platform, behind the wagon. Mr. Hoodihan was on the front of the wagon. I think Miller had been driving, but Hoodihan was holding the mules. They stayed there just a minute or two. Miller went on and dumped the dirt, and Hermis went along by the postoffice, and when I came out Hermis and Miller were both on the wagon, and they drove around to where they were getting dirt. I went ahead and went to Gregory's and to the telephone company. I went to Gregory's store, and had delivered the freight, and collected the money, walked to the back door, and looked out when they drove up. They drove in and turned around and Brown was standing by an electric light pole and they drove close to him, and he got out of the way and walked on the dump, and Hermis jumped off the wagon, and started up on the dump. It seemed that he kinder slipped back, started again and went up. When he went up Brown started off going off sideways, trying to get out of his way, and running over his slicker. He grabbed his slicker up in his hands and began to shake it, and by that time they had run behind the little house and when they ran behind there I heard the first shots fired, and when I ran out of the door the second shot was fired. I saw them at the second shot. Brown was backing and Hermis was crowding him. I mean by that he was going on to him. They were about four or five feet apart. The next thing I saw Hermis made a grab at the gun, and Brown threwed the gun up, and Hermis grabbed at the gun with his left hand, and throwed his left hand around and the third shot was fired, and

Hermis wheeled and fell about half way past Mr. Brown. 172 and he fell kinder on his shoulder, over to one side, and then he got up in a kind of a humped position. Brown kinder took a step or two before his feet and had his gun toward his side and the fourth shot was fired. Then Brown took his gun from his left hand to his right hand and walked on off. I was in the back of the Gregory store in the door. The store was kinder North from the difficulty, across Bowie Street. The house that got in line between me and the parties was a pretty good sized little toilet out there. I could not say whether Hermis had a knife or not. At the third shot they was right up at one another in grabbing distance.

Mr. Dougherty (resuming): Show the jury what you meant Hermis was doing with his right hand?

A. Well, I could not tell exactly, he grabbed at the gun with his left hand, and his right hand was going around that way (Illustrating): I could not see what he was doing; it looked like he was striking at him in some way.

Cross-examination:

I have been working for Bob Brown about seven years, and am still working for him. Feel friendly to him. I did not feel friendly to Hermis. I have been unfriendly to him for sometime. I was standing inside the Gregory store, and the first shot was fired. I could not see the first shot. I do not know what position Hermis' hands

were in at that time. Edward Gregory was with me standing in the store door. I do not know that he was outside the door, and I was standing inside the door in the door-way. I would not say that he was not standing outside or not, because I am not sure. After the first shot was fired, I jumped out of the door. I could see the second shot. I could not tell how long it was between the first and second shots, just an instant. The second and third shots were
 173 about the same distance apart, and between the third and fourth they were a good little bit apart, not so awful long. A good deal longer than the time between any of the others. I was still standing there when the third shot was fired, and was still standing there when the fourth shot was fired. I did not get on my wagon and start to drive between the third and fourth shot. Mr. Hermis fell after the third shot. He and Brown were facing each other when the third shot was fired. Hermis fell south, kinder facing. He fell toward Brown, sort of past him. He turned as he fell, fell on his shoulder and raised himself up in a humped position, sort of supporting himself on his elbows. He was like that when the fourth shot was fired. He was not cutting or shooting at him then. I could not see that he was doing anything to Brown then. I could not say that Brown shot down on him. He had his pistol in a position like that (Illustrating). If he shot him, he had to shoot down

DAVE STOCKBRIDGE, called in behalf of the Defendant testified:

Direct examination:

My name is Dave Stockbridge. I live in Beeville, and run a tin and plumbing shop. I am related by marriage to the defendant Brown. My wife is his niece. I was at the scene of the difficulty on the day it occurred. I was standing on the edge of the excavation, watching the foreman and building inspector, staking off the places for foundations. There were four of us standing together, Ellis Quinn, A. F. Lutts, Wallace Toomey and myself. Ellis Quinn is postmaster at Beeville. Mr. A. F. Lutts and Ellis Quinn, are in attendance on Court here. Two shots first attracted my attention to the difficulty. I turned around to see what it was. Back of me, the way I turned to look I saw up on a pile of dirt thrown out of this excavation two men, the defendant, Mr. Brown, and the
 174 deceased, Mr. Hermis. Mr. Hermis was going toward Mr. Brown, and looked as if he was trying to strike him, and to be reaching for him. He was endeavoring to strike him with his right hand. He was reaching, striking like this (Making motions). It looked to me all the time that he was going towards him. He was reaching like this with his left hand (Illustrating). With his right hand he seemed to be striking like and reaching. They were not more than 2 or 3 feet apart. I could not see from where I was whether or not Hermis had anything in his hand. I was not looking to see if he had anything in his hand. I did not think about that. I saw him for a few seconds. I did not see anything in his hands. I do not know whether he had anything in his hand or not. The

two shots that had been fired attracted my attention, and I saw Hermis going after Brown. They continued to go for several steps, and I saw him shoot the third shot. I was standing at just a little angle off of a direct line from the way the gun was pointing, and I thought about moving, so I turned and walked off around the north side of the excavation. Meantime the fourth shot was fired, while I was going to the north side of the hole, and I turned and looked back and Hermis was on the ground down and Brown was walking off going North. I did not know where Brown went. He came North a few steps, and turned and walked West. He had a pistol in his his hands. I did not see him lay it down any place. Many people congregated there immediately after the shooting; inside of 2 to 5 minutes there were 50 or 60 people around there I guess. Among the people that were there I saw Paul Perkins, I think. That was afterwards, when I started to the postoffice. It was about 5 or 6 or 7 minutes after I left my shop, and returned by the scene of the difficulty on my way to the postoffice. Mr. Perkins was constable. I think Sol Miller was the first one to the deceased after the shooting. I saw him with the deceased's head on his knee. When I stopped at the north side of the hole, and looked back, Sol Miller was
 175 the nearest one to him at that time. I could not tell at that time whether the deceased was alive or not, from where I was. At the third shot Mr. Brown's gun was held in his left hand. At the third shot it looked to me like the gun was held in line with me. That impressed me to move. I think all of my associates moved with me at the time. When I got around to the north end of the hole Mr. Toomey was standing by me. He was with me before the shot was fired. I know he moved. I guess the rest of them did. Mr. Toomey was there when I was there. He said "How did you get here so quick?"

Cross-examination:

My wife is related to the defendant. She is his niece. I am his nephew by marriage. I saw the third shot. When I first looked around, they were standing up. Brown was backing back, and Hermis was right in front of him, 3 or 4 feet in front of him, going towards him, in a reaching attitude, and that was the position of him as long as I saw them. Brown was neither backing fast nor slow. He was just backing back. Hermis was in a reaching attitude. Brown's gun was in his hand when I saw it. He was backing up. Hermis was going forward in a reaching attitude. Then the shot was fired. There was nothing between me and Hermis' hand to obscure my vision in any way. I was about 30 steps from Hermis at that time. I could see his hands, but I do not think I could have seen anything in them in the short time I was looking at them at that distance. I mean to leave the inference to the jury that he had something in his hand there, that he had something in his hand. I think he had a knife. I think this, because he was reaching. He had another hand to reach for the gun with. I guess he would need both hands to get hold of a gun from a man larger than him pouring shot

into him. I do not know that Brown was backing, so that he could have the gun free to shoot him. I do not know that Hermis was trying to grab the gun and save himself. I do not mean to say
 176 that I saw anything as big as this little pencil in Hermis' hands. I thought he had something in his hands, because I saw him in a reaching attitude; those are my words. I have talked to Mr. Dougherty about the case, and no one else. I have not talked to Brown, nor to any other witness. It is not because I am Brown's nephew and want to help him that I think this. I do not think it by reason of anything I saw in his hands.

JOHN MURPHY, a witness for the Defendant, testified:

Direct examination:

I was on the stand yesterday, and was withdrawn until this morning. I was asked about a difficulty on yesterday that I had seen at a saloon. It was about 2 and a half years ago. Present at the meeting were Jim McCullon, Pat O'Rielly, Bob Brown and myself. We were standing in the saloon talking, late in the afternoon. Hermis came in with a knife in his hand, cursing Bob. He said you "You God Damned son-of-a-bitch, you are talking about me." We were not talking about Jim Hermis at the time. When he said that he was going toward Bob. I stopped him. I got in front of him, and put my hand up against his shoulders and stopped him. He looked like he was mad. I think he was very angry. Then Walker Malone, an officer came in, and went to him and took the knife away from him, and he went into his pockets and got out another knife. I suppose he was trying to use it. He whipped out the knife and Walter took it away from him. Bob had not said a word to him. Bob said, "I was not talking about you, and if I have said anything I want to apologize," and he said, "You son-of-a-bitch you can't apologize to me," and then Walter took him off. Walter Malone was deputy constable at the time, either that or deputy sheriff. He was a peace-officer there.

177 Cross-examination:

When Hermis came in to the saloon we were talking there. He seemed to think Brown was talking about him. He said to Brown, "You God damned son-of-a-bitch, you are talking about me." Brown did not apologize to him at that time. He apologized to him after Walter Malone had taken the second knife away from him.

Q. He had called him a son-of-a-bitch twice at that time?

A. What.

Q. After the second knife had been taken away from him, he called him a son-of-a-bitch a second time?

A. I do not understand.

Q. It was after he had called him a son-of-a-bitch a second time that Brown apologized to Hermis?

A. Yes, sir.

JAMES McCULLUM, called in behalf of the Defendant, testified:

Direct examination:

My names is Jim McCullum. I live in Beeville. Have lived there all my life, except seven years. I was employed in a saloon in Beeville, working with my brother before the saloons were closed there. They were closed in February, 1916. I remember the incident in the saloon, when something occurred between Brown and Hermis. It was in September or October, of 1915. I was behind the bar, three or four of us were talking when Hermis came in. Those who were in there with me were Mr. Murphy, Mr. Brown, Mr. Reilly, and Mr. McCullum. Hermis came in at the door, and said something to Mr. Brown, and Mr. Murphy stopped him. Hermis had a knife in his hand. Mr. Hermis seemed to be angry at the time he came in.

Walter Malone came in about the time Murphy stopped him. 178 He was a peace-officer at the time. Malone took the knife from Hermis. I think Hermis then produced another knife. I did not see that. I was behind the bar. Mr. Malone then took him outside of the building. I know he produced another knife because I heard the boys in front of the bar say so. I heard the statement just as Malone took him outside at the time. They said he came out with a second knife after Murphy had taken the first one away from him. Mr. Malone did not have to resort to any force. He just took it away from him. He just asked him to give him the knife. Hermis said when he came in, "Brown you mean that for me." Brown said "I was not talking about you," and Brown tried to apologize to him, and he told him that he could not apologize to him.

Cross-examination:

When Hermis came in to the door they were standing at the bar and I was behind it. Brown and others were standing in front. They were just talking. They had had a drink. I do not know how long they had been there, I had been there only about 30 minutes when it occurred, and found them there when I came in. I think I served them some drinks. I do not know how many rounds. I could not say whether I served them one drink or two. To the best of my recollection, when Hermis came in he said to Brown, "You son-of-a-bitch, you mean that for me." Brown said "No, Hermis. I was not talking about you, I did not know you were out there." That all happened in just a minute, and then Malone came in. Brown tried to apologize to him, and he told him he was not talking to him, and Hermis said, "You can't apologize to me." This was after he called him a son-of-a-bitch. Brown did not resent it at all, did not make an offer to resent it.

179 JACK CARVEL, called in behalf of the Defendant, testified:

Direct examination:

I live in Orange Grove. I am a deputy collector of the Internal Revenue of the United States for the Third District of Texas. Before entering the internal revenue service I was cashier in the State Bank at Orange Grove. Before going to Orange Grove, I was at Beeville. I arrived in Orange Grove the day before Thanksgiving, 1914. I knew Jim Hermis. I also knew Bob Brown. My relations were friendly with both of them. I was cashier and clerk at the S. P. Depot where I lived. My duties brought me in contact with Mr. Hermis. Mr. Hermis made threats concerning Mr. Brown during the year 1914. I think it was in the latter part of August, 1914. I cannot state on how many occasions specifically he made these threats to me, but it was several times. The first time he stated to me that he had trouble with Brown once, and that the next time they would have trouble they would have to carry one of them off in a pine box. His manner at the time was he was so angry that he was crying with rage when he said it. Mr. Brown was not there at the time, and had done nothing to him at the time that I knew of. In talking about Brown he would get so excited and angry that he would start crying about it. He would not boo-hoo out loud, he would just shake and tears would start to run down his eyes. I conveyed this information to Mr. Brown. I told him this in a casual conversation, that Mr. Hermis and gotten into a fuss with me about this proposition, and I told Brown on the street. I told him about what Hermis had told me. During the course of this conversation, that I had with Hermis, he pulled two knives out of his pocket, and said if I wanted to start anything he was ready. In regard to how he pulled out the knife, I was telling awhile ago about this warehouse ruling, which was the cause of it. Hermis came in there and said, "What
180 do you mean by trying to keep me out of the warehouse?" I said, "I do not mean anything by it," but we expect to check the freight up before we deliver it." He said, "I expect you are trying to favor Bob Brown now. I do not expect you are keeping his men out." I told him that we were not making any discriminations, that we had to keep everybody out. That was when he whipped out the two knives and asked me if I wanted to start anything, that he was there.

He said that he had trouble with Brown once before, and that if they ever met again one would have to be carried off in a pine box. Just before he said that he pulled his knife. Prior to that time Mr. Hermis had made similar communications to me two or three times. On the other occasion, in a casual conversation, he brought up the subject of why he disliked Mr. Brown. It was at the depot, and before the quarrel I had with him, probably a month or two. He said he did not hate a soul, but Bob Brown, he hated him like poison, he said he had had trouble once before, and that he had been whipped, and that if they ever met again there would be a different tale. One would be carried off in a pine box. Mr. Brown went to the

depot about this time on his business. Mr. Hermis went there too. Mr. Brown came very seldom to the depot himself. I know why Mr. Brown quit coming to the depot.

Cross-examination :

They both continued to live in Beeville. It is a town of about 2,000 population, in August, 1914. They were both about the town constantly. They were both on the streets there. Hermis came to the depot frequently, and Brown occasionally. Brown's wagon came there. Hermis did not make any other threats against Brown after August, 1914.

181 RUFUS TAYLOR, called in behalf of the Defendant, testified:

Direct examination :

My name is Rufus Taylor. I live in Beeville. I have lived in Beeville 26 years. I am cashier for the G. H. & S. A. R. R. I knew Mr. Hermis in his life time. I saw him every day before the date of his death. He has made threats to me with reference to Mr. Bob Brown on several occasions. It was Friday afternoon before he was killed on Monday. That was the last occasion that he made a threat to me about Bob Brown. Hermis made the remark that Mr. Miller claimed they were having some trouble over the dirt at the postoffice building, and Hermis told Miller that if there was anything else to come to let him know; that if he could not settle it he would fix Mr. Brown. That *had* had some trouble before about some package, and he was telling me about it at the depot. He told me that he had it in for Brown, that he had offered to make up with him, but that he did not have a temper that way, that when once he got it in for a man he could not make it up. He told me that Mr. Brown had made the offer to make up. He said if ever they had any racket again, that one or the other of them would have to buy a black box. I do not know exactly when this was. There was something coming up all the time I was at the depot. There was always difficulty some way or other with Hermis and his competitors. I had a conversation with John Ruebush, after this conversation, on Friday night. We were neighbors, and happened to be in the yard at the same time. I told him about the circumstance. We discussed the situation.

Cross-examination :

I asked Ruebush if there was any trouble. I told him exactly the conversation between me and Hermis. I did not tell Brown.
182 I never told Brown any of these things. The first time I told Brown, or his attorneys, about these various occasions, was when we were discussing it the other afternoon in Mr. Dougherty's office, after I was subpoenaed here in town.

PAUL PERKINS, called in behalf of the Defendant, testified:

Direct examination:

My name is Paul Perkins. I live in Beeville. I am in the ranger service. Stationed at Laredo. Before going into the ranger service I held a position at Beeville as deputy sheriff and constable. I became acquainted with Bob Brown and Jim Hermis. I had occasion to go to the train. I was sent there on special duty at the request of Mr. Brown, and Mr. Ruebush asked me to go there. My duties there were to keep down trouble from Mr. Hermis. At the time I went down there on this special duty, Mr. Brown stopped going to the depot. I heard expressions of threats from Mr. Hermis concerning Mr. Brown. I could not say how frequently, several times. I heard some at or about the depot. I do not recall when it was. It was over two years ago. It was at one time he was having some trouble with Harry Brown; as well as I remember that was the morning train, or the evening train from Corpus. Harry Brown was Bob Brown's son. When I got there Hermis had his knife out, and had Harry Brown standing leaning up against the wall of the depot, and Hermis was telling him that he had as much right to solicit trade there as he had, and that he did not want to have any trouble with him, and he was cussing Mr. Brown to Harry, and told him "I will cut your head off," and he told him something about, using the big knife he had on Mr. Brown, but as well as I remember it the knife he had in his hand then was a small pocket knife.

183 He had Harry Brown up against the wall of the depot.

Harry was something like 17 or 18 years old at that time. He is in the United States service now. I went to Mr. Hermis, and got hold of him, and told him to put his knife up, and told Harry to go on off, and he went. Mr. Hermis was there standing with his knife in his hand, holding it up like this. He was mad. I do not know to what extent, he was mad and abusing the boy, talking about using his knife on him. Another time I made him put up his knife, when Mr. Ruebush (Witness interrupted). I do not remember how many times Brown asked me about having Hermis put under a peace bond. I know he came to me one time, and I told him to go and talk to Mr. Thornton about it. He was the sheriff. I was not at the homicide when it occurred. I got there a very few minutes afterwards. There were several people there when I got there. I do not remember anybody near the body of the deceased but Sol Miller. He was holding Hermis' head on his leg. Hermis frequented the depot more than Brown. After the time Brown sought to have Hermis placed under the peace bond Brown did not go to the depot about his business. He quit before that. I did not see him around the depot.

Cross-examination:

I have been a peace officer of that county for about nine years continuously. Hermis had Harry Brown backed up against the

wall with a knife. He was holding a knife in his hands. The boy was backed up against the wall of the depot, and he was talking to him. I did not arrest Hermis. I just separated them and went and talked to Mr. Thornton about it. The reason I did not arrest him was I was trying to get this trouble settled between him and Mr. Brown, and we decided it was best not to make Hermis pay a fine. The reason I did not arrest him was I was trying to get this trouble stopped. I had talked to Thornton about it several times, and he

184 had talked to Hermis and Brown. I did not think it was for me to say whether or not the law should be enforced in that county. It is mostly for the Courts to say whether an officer shall make an arrest or not, when he sees an offense being committed. We talked to the Court about it. We did not have any case before the Court. I did not see any part of the killing. I have been away from Beeville since the 26th of December. I was sworn in as a ranger on the 21st. I did not arrest Hermis. I knew of his being arrested there, charged with the offense of cutting Mr. John Rigby. I do not know what the result of that was. It seems to me like he had a trial and was acquitted. I would give anything in favor of Hermis that is true. I can remember for both Brown and Hermis. According to my recollection Hermis was acquitted in the trial about the difficulty with Rigby. I do not remember any trouble he ever had during the nine years that I was peace officer. I never heard of any offense other than this one, and he got clear of it. I went for a while to every train when I possibly could on the special service for several months. I do not remember what year, before the homicide. I could not say, it was during the time that Hermis and Brown were having the trouble. I do not remember what year it was in. I was there several times, and was there a good deal of the times at trains at other times before and after that.

Q. You went there at other times before you were on duty?

A. Yes, sir.

Q. Is it not a fact that everybody in Beeville watches the trains?

A. I do not know.

Q. Don't you know that in Beeville about one-third of the town is out there to see the trains?

A. I guess it used to be.

Q. You went there as much for your curiosity as for anything else?

A. Yes, sir; but I was asked to go there.

185 Q. You were going before you were asked, and went after you were asked; you would have been there anyhow?

A. Yes, sir, well, maybe I would and maybe I would not.

OSCAR FRANCIS, called in behalf of the Defendant, testified:

Direct examination:

My name is Oscar Francis. I live in Skidmore. I have lived there for six years. I am a car inspector for the S. A. & A. P. Ry. running through the town of Beeville. I was at the train one day

and I saw Mr. Hermis there at the time. There was some difficulty. The difficulty was with Mr. Brown's son. That was the one he spoke of. I did not know the young man. He was a fleshy kid, and when the difficulty was over I inquired who the boy was, and they said it was Mr. Brown's son. This was some 3 or 4 months before the homicide. The trouble came up about something, I never paid much attention to it. I went over there to do some work, and I had just finished the job, and was going back on No. 11. It was 6.25 in the afternoon, that was the time the train was due, and it was just pulling in. I did not see the first part of it, I saw Mr. Hermis, or a man supposed to be him; I did not know him at the time; I paid attention after he drew the knife, and I eased up close to where they were at, and they were crowding around; he drew the knife and I did not know the exact words he said, but there was something that he made some threat about he was going to fix his Daddy; I could hear something about jumping on his Daddy, and he said something about he would fix him. He pulled the knife on the young man. He looked like he was about 18 or 20, Mr. Brown's son. He was pretty close to the young man when he drew the knife, pretty close to him. I eased up there because I did not want to see him over-run, in case that nobody else interfered. I did not want to see him overrun the kid with a knife, but I believe it was 186 Mr. Perkins who came up about that time. He was considerable. He interfered and made him put the knife up I believe. After a good little bit, after Mr. Perkins had made him put the knife up, and he kept talking, and he put his hands in his pocket and got another one out, and with the two in his hand shook them that way. One of them was an average size, and the other one was smaller. I believe one of them was a Barlow, a bone-handled knife. I never paid much attention to it. I was in a hurry to get to the train. One was pearl handled I believe, and the other was a bone or horn handled knife. Mr. Hermis was very much stirred up. He was awfully mad apparently, awful angry.

Cross-examination:

I did not see the beginning of the difficulty. The boy was as big as an averaged sized man, but he didn't look like he was old. I believe he was big as Hermis. I would not be positive. He was a man in size, but appeared to be young, about 18 or 20 apparently. I did not see what provoked the difficulty. I was not paying any attention. I did not know what passed between them. My name is Oscar Francis.

HIRAM CHENEY, a witness for the Defendant, testified:

Direct examination:

My name is Hiram Cheney. I live in Beeville, Bee County. I am a farmer. I saw a difficulty between Mr. Rusbush and Mr. Hermis in the town of Beeville. It occurred in the Busy Bee restaurant, either in January or February. I heard a threat made by Mr.

Hermis in regard to Mr. Brown. He said he had the change for Mr. Brown. At the time he was standing up there with his knife in his hands. He acted like he was mad to me. I was in the restaurant at the time this happened.

187 Cross-examination:

It was either in January or February, 1917. I did not hear the commencement of the conversation. I did not see what had gone before that, and did not know what Ruebush had said or done.

Dr. HARRY G. HEANEY, called in behalf of the defendant, testified:

Direct examination:

My name is Harry G. Heaney. I live in Corpus Christi. I am a physician and surgeon by profession. I have been practicing a little over twelve years. I graduated from the University of the South, at Sewanee; I matriculated at the University of Paris, in France; I also attended the University of Texas, in the beginning. The aorta is the principal blood vessel which comes from the heart; it comes up about the first or the second space of the ribs, turns around and goes on back, and goes down to the diaphragm, and afterwards enters the abdominal cavity. It gives off numerous branches into different parts; for convenience of description it is divided into the ascending, the transverse, and descending aorta. The transverse aorta is where the ascending artery comes up into about the second space of the ribs, and as it turns that is the transverse aorta. The ascending aorta is the portion of this big artery just as it leaves the heart; and the descending aorta is that portion of it from the fourth vertebra down through the diaphragm, into the abdominal cavity. If a man weighing some 155 pounds was shot with a bullet about between the 5th and 6th ribs, cutting the thoracic aorta, severing it entirely; I should say that he would survive the hemorrhage resulting from that wound for at least two minutes; possible three of four.

188 He would not die at once from the hemorrhage within the time that the blood ordinarily takes to circulate through the body, because the descending aorta is considerably smaller than the ascending or the transverse aorta, because the big blood vessels going to the head come off from the transverse aorta; you have the Carotid and the Subclavian arteries, and these big arteries going into the head and arms, and when you get to the descending aorta you have a much smaller vessel, and if it was severed by the bullet, the patient would still be conscious, as far as the circulation is concerned, because the circulation in the head would not be impaired until the blood had run out. He would survive from two to four minutes after the severance of the aorta, and would be able to struggle. The circulation of the body is divided into different portions, the blood all comes out from the heart through the aorta, but then it is distributed through various branches, and the first branches are the

Coronary branches, about the size of a goose quill, which go to the heart itself, and afterwards these big branches who go to supply the head and arms, and part of the chest wall; all of these branch off before you get to the descending aorta. If there was a bullet wound upon a man's body, between the 5th and 6th intercostal spaces; the bullet coursing backward, and very slightly downward and inward and severing the last portion of the thoracic aorta, and entering the abdominal cavity through the diaphragm, about one inch to the left of the spine, I would not say, from that course, that that wound could have been inflicted while the man was lying on the ground with his elbows, raising himself, and turned somewhat to the right; the assailant would have to be standing back of him in order to get that position. The assailant I mean would have to be standing to the left and back of the man who was prostrate, unless he had his hand around; because the wound went down and inward.

189 Cross-examination:

The ascending, the transverse, and the descending aorta, are all connected; they all form one big vessel. The statement that the last portion of the thoracic aorta is severed, indicated to my mind that it is severed just before passing into the abdomen. When it is severed at this point there is nothing to prevent the draining of the heart and all of the blood vessels through the opening, save that the vessel itself is smaller at that place than it is higher up. It is just a question of how fast the blood can run out through the opening; just as if you were to cut a pipe in a water system; it is just a question of time. There are valves in the aorta that will tend to hold the blood. It is just a question of time how fast the blood can run out. When this aorta is severed there would be a slight anemia of the brain produced; I say slight, because the aorta is much smaller at this place; the blood vessels going to the brain and to the shoulders branch off above, and are so large when they come off there that this one that goes to the lower part of the body is smaller, and its severance makes less difference. In a man that weighs 155 pounds it is a pretty large artery, I should say a quarter of an inch in diameter; the arteries are different sizes; that is a pretty big artery. If the testimony shows that it was a half inch in diameter, I would accept that statement as correct. I stated, that in order to receive this wound that has been described, the man would have to stand behind and to the left of the party wounded, provided the latter were lying down, supporting himself partly on his elbows; I speak, not from medical learning, but from common sense. I do not claim to be an expert on matters of range and deflection. I am a medical and surgical expert; and I am testifying as to the range of the bullet after it reached the body. If the deceased Mr. Herms was lying on the ground, partly raised on his elbows, turned slightly toward the defendant, Mr. Brown, he, Mr. Brown, would have had to have been back and to the left of him, in order to make that wound;

190 unless the assailant were to the left and back of him, the wound would not have passed downward inside of his body.

If he bent over him that way (referring to counsel's illustration); the angle would have been straight down, to the floor; if the body had been slightly slanting, the angle would have been downward slightly, and inward.

Redirect examination

The paper which was held by the District Attorney was held perpendicular, in the position of a man erect; if a man were in that position and a shot were fired into him by another man erect that would go straight in; if the man shooting were a little taller than the man shot, that would give it a downward course. When I told the jury just now what position a man would have to be in in order to inflict the wound under discussion, I was dealing with the hypothesis that the man shot was lying down on the ground, and not erect. If this bullet entered between the 5th and 6th intercostal spaces, severed the aorta, and then penetrated the abdominal cavity through the diaphragm, the necessary course of that bullet in order to have that range was downward and inward. To pursue that course, the bullet would have to travel at an angle, about half of a right angle, about 45 degrees.

Recross-examination:

I do not remember how you held the paper with which you were illustrating the position of the deceased. You are holding that paper now flat; now you lift it slightly. Now if the defendant Brown had stood on the right of the deceased and held the gun directly over, the only way in which he could have made that wound, downward and slightly inward, was by turning his hand like this, (illustrating). If the deceased was on his hands and knees, leaning forward like this (illustrating), he could have done it, if he was

191 facing downward; but if he was facing upward, pushing himself up with his arms, he (the assailant) would have to be on his left side, and he would have to reach his arm clear around. The statement is "A bullet wound about one inch to the left of the sternum, in the 5th intercostal space, bullet coursing backward, and very slightly downward and inward, and entering abdominal cavity through the diaphragm about one half inch to the left of the spine," now to have inflicted that wound (wound) I say that the assailant would have had to have been at his head; I do not think he could have stood over his victim and given him that wound. I will have to leave my statement as it stands.

Dr. H. R. GILES, called in behalf of defendant, testified as follows:

Direct examination:

My name is H. R. Giles; I am practicing medicine, a physician and surgeon; I am located in Corpus Christi. I have been engaged in the practice of my profession for nineteen years. I am a graduate of an accredited medical college. I have taken post-graduate

work at Tulane. I graduated from the State University of Tennessee, when I graduated it was then known as the Memphis Hospital of Tennessee; it is now known as the State University. A bullet, to enter a man's body at a point between the 5th and 6th intercostal spaces, to sever the last portion of the thoracic aorta and to enter the abdominal cavity through the diaphragm, would have to be going downward and backward. If a man weighing about 155 pounds received such a wound, and the thoracic aorta were entirely severed in its last portion, as stated above, it would take anywhere from three to five minutes for death to result from the hemorrhage; it would depend altogether if the aorta was entirely shot out, but he could possibly bleed to death in two minutes; I

do not think he could do it under two minutes. My reason
192 for that statement is this: in the severance of the aorta you

would have to give the blood time enough to make the circuit from the head and descend back to the heart, and be pumped back through the aorta and lost at that point into the abdominal or thoracic cavity, because the transverse aorta gives the arteries off to the head and the upper extremities, so that blood has to make a circuit back to the heart, and then from the heart back through the aorta; then of course a portion of that would go through these main blood vessels to the head again. In other words, the circulation would be maintained in the upper portion of the body until there was a final exhaustion of the supply of blood; because there would be no reflux of blood from the lower part of the body to the heart at all. The larger vessels or arteries leading off from the aorta are, the anominate artery; afterwards, the arteries to the heart itself; the anominate is the first division of the artery that divides into the right subclavian and the carotid artery, to the right arm and head and neck; then the next division would be the left subclavian, that is the next division of the aorta; and the left carotid artery. These arteries depart from the aorta before you come to its descending part, so that the circulation through them is maintained to a certain extent notwithstanding the severance of the descending aorta; a man shot as above described, with his aorta severed could struggle and move in the period of two to five minutes which would intervene between the wound and his death; if when shot, he fell back, he could struggle and make an effort to rise. If a man were shot by a bullet entering between the 5th and 6th ribs, at a point about one inch to the left of the sternum, and it severed the last portion of the thoracic aorta, and entered the diaphragm, going through the abdominal wall; if the man shot was lying on the ground, raising himself somewhat upon his elbows, turned somewhat to the right; in my opinion it would be impossible for that shot to have been fired by a man standing at the right side of the body of the deceased, or any place down about or at his feet; the bullet

193 could not take that course if the man shooting was below the median line; if the man was in a reclining position; it would not look reasonable. The last portion of the thoracic aorta is where it enters the diaphragm; at that point it is directly in front of the spinal column. A bullet which entered a man's body between the 5th and 6th intercostal spaces, and severed the last por-

tion of the thoracic aorta, entering the abdomen, would have to come from above the median line; if the bullet entered and took that course, it was evidently from above. By coming from above the median line, I mean this, that if you stand on a level with me and shoot me, the bullet goes straight in; now, if the bullet goes downward, it must necessarily have been fired from above; in other words, if a man was in a reclining position, lying with his face up, somewhat raised on his elbows, say perhaps from eight inches to one foot from the ground, a shot to go downward into his body would have to come from above the median line; that is, the man shooting would have to stand behind the man shot; to so wound a man it seems to me that the shot would have to come from behind, or above; I mean by above, back of him; assuming that the man shot is lying on the ground like this plank (illustrating), this is his head, and this is his feet, now I shoot down into his body, and the bullet courses as we say, downward and backward, for the bullet to travel thus it must have come from above the median line; and a man, standing erect, to have fired that shot must have been up near the man's head; I cannot see how he could have been any other place.

Cross-examination:

Where the party doing the shooting would have to have stood, would depend a good deal upon the angle at which the pistol was held. Supposing that the man shot had fallen on his back, and was raising himself up on his elbows, leaning forward, trying to get up, and the man doing the shooting is at his right side,

194 about the middle of him, I do not see how he could have inflicted that wound; if the bullet coursed as described the man was bound to have been back of him; I do not see how he could have been elsewhere. If I am above you, and you are in that position (referring to counsel's illustrative attitude) and you lean over and try to get up, I think the bullet would range down. (Counsel changed position). In that case the bullet would go up towards your head. (Counsel again changes position.) If you are in the position which you now occupy, the bullet would go down, and if you were a little further it would still go down; but, if you were lying on the ground, the bullet would have to go up. The assailant would not necessarily have had to have been back of that man.

Redirect examination:

If the man shot was just upon his elbows, just as high off the ground as he would be supported by his elbows, my theory is that his assailant could not in any way in the world shoot him so as to make that wound from the position in which I am here (referring to witness' position at feet of counsel); as I understand it the shooting occurred from here, now, then, the bullet would go up.

Recross-examination:

Supposing that the man shot were struggling to get up, I think the bullet would have a tendency to go upward. I am standing this way (at foot of counsel making illustration), the bullet would go up; if he raised up, the bullet would go the other way.

Witness excused.

195 ROBERT B. BROWN, Defendant, called to testify in his own behalf.

Direct examination:

My name is Robert B. Brown. I am the defendant in this case. *I am the defendant in this case.* I was 44 years old the 28th of this month. I am a man of family. I was born in Clinton, De Witt County, Texas. I reside in Beeville. I resided there about 30 years, I think, to the best of my recollection. I was engaged in the transfer business in Beeville. My duties are overseeing it. I operated wagons. I remember the excavation, the beginning of the excavation of the postoffice building over there. I remember about when it was when it commenced, in a general way. It must have been in April of last year. I have heard the testimony in regard to the killing of Mr. Hermis. I went down to the site of the postoffice excavation and building on the day the witnesses have spoken about, on the 7th of May, 1917, in the afternoon. I took arms down there with me that afternoon. When I left it was sprinkling a little, it had rained the day before. I went to town on one of my wagons. I had four. A negro driver by the name of Ike Archer went with me. I took a six-shooter with me, a forty-one. It had six chambers. The reason I carried my pistol down there that afternoon I had heard about Hermis and his threats, and I carried it down there to protect myself. I heard the threats from Reubush. Reubush and Carvey had warned me in the matter. I had had previous difficulties with Mr. Hermis. Prior to that time Mr. Hermis had assaulted me with a knife. I had been at work hauling dirt ever since a few days after the postoffice site work commenced. I had done the excavation work for the Government, except the first two days. In taking out the dirt we put clay dirt in 2 or 3 different places. We took the black dirt first from the excavation. The black dirt was placed on the west side of what we called the pit. The white dirt was
196 up against the black dirt for a certain distance, and then for another distance it was up against it, and then for another distance from the light pole to the end down to the street it was all white dirt. The white dirt was on the East side next to the pit, and the black dirt was on the west side of the white dirt next to the alley. That dirt formed the dump we have been talking about here. The dump was about 5 or 6 feet high. I think it was higher in some places than it was in others. The dump was about 150 feet long. It ran from the street back to the back line. I had been on

that work all the time, from the time of the excavation to the day of the homicide. I had at no time interfered with Mr. Hermis or Sol Miller in getting dirt there. I know Mr. Hare. With reference to the Government work he was foreman of the building. It was between 3 and 3:30 that Miller drove up. I was standing at the back facing East against the light post. I was engaged in checking loads from the wagons that they loaded. I had not at any time prior to that during the period that I had been at the excavation, or during the period that the dirt was being hauled, ever interfered in anyway with Miller or Hermis in their getting dirt there. My attention was first called to the wagon when I heard it coming in behind me, and it drove up and stopped. I then stepped away from the post and walked on down south. The wagon was facing North. The post was right in the edge of the dump. As I walked to the south I was walking on the dump. Mr. Miller was at the front of the wagon, and Hermis back of it. I did not see Mr. Hermis at first. I saw Sol Miller first. I just told Mr. Miller that Mr. Hare had asked me to tell them not to haul away the black dirt, that he wanted to use that. He did not make any reply, but Mr. Hermis took it right up, and said "God damn you, you are not running this dirt proposition. I came up here to see about it," and he ran his hand in his pocket and came up the dump with his knife open, and I ran toward my gun, lying back, and I picked up my slicker. I backed and kept backing until I could get my gun out of the slicker.

197 At that time Hermis was striking at me with his right hand, with a knife in his hand. As Hermis came up the dump I told him to stop. He did not stop. I had to go back about 25 feet, 20 or 25 feet to where I got my gun out of my slicker. Mr. Hermis must have been 4 or 6 feet from me at the time I reached down and got my gun out of my slicker. After I got the gun out the slicker I told him to stop. He just kept coming, striking at me. When I got the gun I told him to stop, and I fired it. When I fired the shot I was running backward. He was coming forward toward me. He had a knife in his hand. The blade looked about 3 or 3½ inches long. I thought Mr. Hermis was trying to kill me. He had drawn a knife on me twice before that. Prior to that time I had received word from him, through my son Harry, as to his purpose or threat against me. I had never at any time sought any difficulty with him. During the whole period of the trouble between me and Mr. Hermis I had endeavored to avoid any difficulty with him. I had my pistol in my left hand. I am a lefthanded man. He did not stop when I fired the shot, he kept coming and I kept backing. I fired again. The shots were right close together, about as close as they could be, as fast as I could cock. Hermis did not stop at the second shot. After the second shot he got to me and grabbed the barrel of the gun with his left hand, and striking at me with his right, and I grabbed his hand, and as I grabbed his hand to pull it off I shot again. I grabbed his left hand with my right hand. He had hold of the barrel and I pulled his hand off. At the time his hand was pulled off the gun I fired the third shot. There was powder burn on my hand, on the right one. I washed it off at the courthouse in the present

[presence] of Mr. Thornton and Zac Partain, sheriff and district clerk. When I fired the third shot Hermis started to fall, and I stepped out to one side, and he fell right backward. He turned when he fell. He was lying this way with his arms out this way lying flat. What I did then was I had my gun, I let the hammer

198 down and it went off accident-ly and shot. That was the fourth shot. At the third shot I was in front of Mr. Hermis.

I was holding my gun down about like this, pointing straight ahead of me. He grabbed it with his left hand. I shoved his left hand off the gun with my right hand. It was about 30 or 40 feet from the point where Mr. Hermis came up the dump to the point where he fell. I struck Mr. Hermis over the head after the third shot once. I think it was right on the ear, I struck him. I struck him because he did not stop, kept coming. At the time I fired that shot he was striking at me all the time, until the time he fell. He was right at me when I fired the third shot. I could not say how far. I did not strike Mr. Hermis after he was down on the ground lying on his back. I do not remember that Mr. Hermis said anything to me from the time he started to the time he fell, only he said, "God damn you, you are not running this dirt proposition, I came down here to see about it." He did not say to me, when he was on the ground, "Bob, don't shoot." He never said anything; when he was on the ground he was dying. I would not have struck him then. No, sir, I would not. After the shooting I went to the garage, where I had a phone and office and went over to the courthouse. Sol Miller was standing over there behind the post, and I asked him why he brought that man down there to raise a row with me. I don't know what he said. I did not say to Sol Miller, that if I had another load I would use it on him or kill him. I did not say to Mr. Hermis when he was the ground there, "Damn you, I will give you another shot." I did not say anything to him, while he was on the ground. I shot Mr. Hermis to protect myself. He was cutting at me with a knife. I believed that my life was in danger from the threats I had heard, and the time he had assaulted me before that, and the manner in which he was going about it then. He had assaulted me twice before that. The first assault was with a knife at the Aransas Pass depot.

199 A. We were joking one another one evening down there at the depot, he was in the hack business, and I was in the hauling business at the time; we were joking one another and he got mad and pulled his knife, and I grabbed it, grabbed his hand this way (Illustrating), both hands, and was holding him, and he bit that finger nearly off trying to open that knife with his teeth. Lutz came, and I told him to get his knife, that I did not want to have any trouble with him.

Q. Then what?

A. Mr. Lutz took his knife away from him.

Mr. Green: Your Honor, we are not trying Hermis for this offense. The details of the matter would not be admissible.

Court: No. it is not proper.

Mr. Dougherty: I only want to show the character and nature of the assault.

Q. Mr. Brown, after that did you continue in the transfer business?

A. Yes, sir.

Q. When was the next time that he assaulted you?

A. It was in the McCullum saloon.

Q. What happened there, tell the jury as near as you can recall?

A. Mr. Tom Clare, and John Murphy and Reilly were standing in there, laughing and joking.

Mr. Green: We do not care to go into all these narratives.

Court: No, that is immaterial.

200 Mr. Dougherty: That indicates the provocation and nature of the assault; the motive and lack of provocation.

Court: The assaults must be testified to, but not the details.

Mr. Dougherty: Note our exception.

I did not give any provocation to Mr. Hermis of any character at that time. I had not spoken to Mr. Hermis at the time of the assault. He came running in there with his knife open, very mad, and Murphy caught him. He said that I was talking about him. Mr. Malone came in and took that knife from him. He was still very mad, and pulled out another knife, and Malone took that away from him, and I told him that if I had said anything, which I had not, that I would apologize to him, and he said, "You son-of-a-bitch you can't apologize to me." At the time he said this he was in the custody of the officer Malone took him off. After that I went back to my horse in front of Mr. Teal's market to go home. Mr. Hermis had threatened my life that way several times in all. Mr. Carvel, Mr. Rusbush, Mr. Parr and Harry had told me of the threats which he had made. After Mr. Hermis made the assault on me in the saloon, I quit going to the depot only when I had to. I consulted Mr. Perkins and Mr. Thornton, sheriff and constable about that. I endeavored to have Mr. Hermis put under a peace bond. I talked to the officers about putting him under a peace bond but they never did it. After that I never did anything to Mr. Hermis, I kept out of his way, and made it a point never to meet him if I could help it. Johnnie Rusbush and Jack Carvel had both communicated threats to me, one of the threats that Ruebush told me of was from Rufus Taylor. The last one was communicated to me Saturday before the

201 homicide. Johnnie told me that he said that if I interfered any more with that dirt that he would "fix my clock." That is what he told Mr. Taylor. In the light of what had gone before I understood he was going to kill me. I had received word before through Mr. Carvel that the next time we would have a fight there would be one of us go off in a black box. Johnnie Ruebush told me that Hermis had told Ike Archer that he was going to fix my clock, that he was going to have two knives; throw one away and the big knife he would have up his sleeve to cut me with. I knew that Hermis had two knives at the time he pulled them in the

saloon. At the time he pulled the other knife I never did see but one. When I was on the dump going backward, Hermis was coming pretty fast, as I was stepping back about as fast as anybody could run backwards without falling. I was stepping back as fast as I could without falling. When Hermis and Sol Miller drove up, I did not say to Hermis, "You came here for a fuss," and Jim did not say, "No, I do not want any trouble with you." I did not say to Hermis, you "Damned son-of-a-bitch, you have been trying to pick a fuss all of the week." I did not speak to Hermis at all, only told him to stop. I was talking to Miller. Hermis had not been at the dump that week, I had not seen him. I had not seen him at the dump for "seven or eight days. I had been going to the dump every day to superintend. It was necessary in the transaction of my business for me to go down there. I had an office and telephone headquarters in Hunt's garage. Will Hoolihan had been hauling dirt with Mr. Miller up to the time of this load. I thought when they drove up it was Hoolihan, up to the time Mr. Hermis spoke. I would not have spoken to them if I had known it was Hermis. After Hermis fell, after the third shot, and as he went to fall I stepped around, two or three steps toward his feet. I was very much excited during the period. At the time I shot him what was in my mind was that he was going to kill me with a knife.

202 Cross-examination:

It must have been over two years ago that Hermis attacked me in the saloon. Somewhere in 1913, I would not say for sure. It was about two years ago, from the time this offense happened somewhere along there, I could not say for sure. It might have been the middle of 1916, or the first of 1916. I could not say exactly. The trouble in the depot was about nine years ago, somewhere in that neighborhood, I could not say exactly. On the day I killed Hermis when I first saw the wagon, it drove up right behind me. I heard it before that, but I never noticed whose wagon it was. There had been other wagons there, there was Mr. Bell and others hauling. My wagon came up to the east side of the dump, and this wagon came up on the west. When it stopped I walked away from the telephone post. I did not know that Hermis was there. I knew there was somebody on the back of the wagon. When I first saw Hermis he was on the back of the wagon raising the side boards. I said to Miller that Mr. Hare said not to haul off the black dirt, that he wanted to use it for his own use. Miller did not say anything. Hermis took it up; He said, "God damn you, you are not running this dirt business, and I came down here to see about it." He said, "God damn you, you are not running this dirt proposition." I did not say, "you son-of-a-bitch, you can't get any of it." He then came up the dump with a knife in his hands. He was about as far as from here to that table when he said, "You are not running this dirt proposition." (Referred to a table about ten feet from witness). It would be further than that, he was on the ground, I suppose about 20 or 25 feet. He got out his knife then, and came up the dump. He commenced cutting at me

when he got close to me. He was four or five feet from me. He was coming with his knife in his hands. I said he was 4 or 5 feet away when he struck at me. He was holding up his knife, striking at me all the time, from just before the first shot. He got as close
 203 to me as $2\frac{1}{2}$ or 3 feet with that knife. I do not think he ever struck me with it. I was not cut. He did not cut my clothes. He was still striking when I fired the second shot. He was just coming this way. (Illustrating.) I cannot say how many times he struck at me before I shot at him the first time. He struck more than once. I could not say for sure. He struck as many as two times. I am certain that he struck at least two times. I was very excited. He then kept coming. He then got closer than he was at first, and he was $2\frac{1}{2}$ or 3 feet at first. At the second shot he was closer than at the first. I could not say exactly. He was closer than he was at the first shot, still striking. At the third shot he had his knife in his hand, and he caught the gun with his left hand. He was still striking at me. I pulled his hand off the gun. About that time I fired, as his hand came off the gun. He then fell. When he went to fall I stepped back and let him fall. After the third shot I hit him. He was standing up when I hit him. I said he fell after the third shot. I did not say right after the third shot. He fell after the third shot. I shot the third shot before he fell. When I hit him with the gun he was still coming at me, and still striking at me.

Q. How many times did he strike after the third shot; I do not want you to make any mistake on this. After you had fired one, two, three shots, and after that third shot, he was still standing and coming forward, striking at you with that knife?

A. He came toward me.

Q. He was coming forward was he not?

A. Yes, sir.

Q. He was still coming forward and striking at you with the knife, is that correct?

A. When I hit him with the gun he was.

Q. And that was after the third shot, was it not?

A. Yes, sir.

Hermis then fell. I could not say whether when I hit him with the gun it knocked him down or not. He fell and turned to the left. Not with his back toward me. He turned around facing me when he fell. He turned around about that far (Illustrating), and
 204 then fell. That would be in the general direction of his back toward you. He was falling all the time. I was on his right side when he fell. I did not walk from the left to the right. I heard several of the witnesses testify. I say it is not correct when they say I was on his left side when he fell, and then walked around to his right. When he fell down flat, I had my gun up this way, and I went to let the hammer down and it went off accidentally. I do not know which way the gun was pointing, but it went off accidentally. I did not intend that shot to hit him. I could not say where it hit him. I did not do anything to help him, after he was down. I did not intend to kill him when he

as lying on the ground, but I did not go to see if that accidental shot had killed him. I don't say I did not care. I was excited. I do not know what I thought. I asked Sol Miller, "Why did you bring him here?" I tell the jury that I was trying to let the hammer down, and the gun accidentally shot him, and I did not intend to shoot him that fourth time. I did not tell anybody to go to him, to help him. I never said anything to anybody. I walked on off. Hermis was left there. I went over to the Court house. He was not begging me to not to shoot him, and I was not talking to him there.

Redirect examination:

The gun was not a self-cocking gun. The shooting was all right now. I hit him after the third shot; just after I jerked it out of his hand and I hit him.

Here defendant rests *its* case.

Rebuttal by the Government.

MAX CLEMENTS called and sworn, testified:

Direct examination:

My name is Max Clements. I am a carpenter. On the afternoon of May 7th, 1917, I was in Beeville, in the postoffice building. I saw the shooting, in which Jim Hermis lost his life. The first shot attracted my attention. I saw Mr. Brown standing at the dump, and saw Mr. Hermis coming up the dump. Mr. Hermis' hands were cut like this, in front of him, probably half way between open and closed. Mr. Hermis did not have anything in his hands. I could see both of his hands plainly. Mr. Hermis did not have a knife in his hands, and was not striking. I saw the last shot fired. At the last shot Hermis was lying on his right arm like that, on the flat of his back, looking toward the East. He was facing Mr. Brown. Brown walked over a piece like this and shot down into him.

Cross-examination:

I was down in the pit in the basement when I heard the first shot, that attracted my attention and I looked up and saw Mr. Hermis coming up the dump. He was coming up on the opposite side, on the west side. I could see half of his body. He was nearly to the top of the dump when I looked around. I could only see half of his body at that range. Mr. Brown was standing facing west. When the shot was fired, Mr. Hermis was going up the dump. I did not see his wagon. There were several wagons there. He was nearly directly toward Mr. Brown and Mr. Brown was practically due East of Mr. Hermis. I was about 70 feet distant. The pit was about 8 feet deep. I am six feet tall. I looked out practically due West as I understand it. I was nearly on the East side and practically in the

center of the excavation. I was working where I had some saw horses. The saw horses must have been 20 or 25 feet from the south side. The excavation was 60 feet wide. The dump ran parallel to the excavation substantially. The building was 60 by 70 feet. The excavation was a few feet wider than the building. Mr. Hermis was going up the dump at a point directly opposite and due East from me. That was probably about half way from the north end of the dump. The dump was considerably longer than the excavation. I did not see any wagon near where Mr. Hermis was coming up on the dump. The first shot must have been fired when Mr. Hermis was down on the slope of the dump, and he came right on up the dump. He came up gradually, that is he was angling off like he was trying to get on the top of the dump, like a man who would walk up hill. He was facing East and going a little to the south. Mr. Brown was on the extreme eastern edge of the dump at that time. When Mr. Hermis came and got on the dump he did not go directly across to where Mr. Brown was until after the second shot was fired, and then he just kept on going in that manner across. He kept going in a southeasterly direction across. Mr. Brown was east of him all the time, and sometimes a little north of him. Mr. Hermis went southeast. Mr. Hermis finally landed at the highest part of the dump on the south end. The dump was some 100 feet or more long. I should say that Mr. Hermis pursuing the southeast course walked about 40 feet from where I first saw him; meanwhile Mr. Brown was standing at that point, and to the north of Mr. Hermis. They were never very far apart. Mr. Brown was walking back and forth all the time. You see the top of that dump was not more than 3 or 4 feet wide. He was just walking back and forth.

Q. Just passing back and forth and shooting occasionally?

A. He walked right in front of Mr. Hermis all the time.

Q. Which way was he going when he was walking back?

A. Who, Mr. Brown?

Q. Yes.

A. He would walk a little way that way, and walk back.

Q. When he walked back, which way would he walk?

A. He would walk North and then South.

Q. About how far would he walk on one of these trips North?

207 A. Probably 10 or 12 feet.

Q. And then he would walk a similar distance South?

A. Yes sir.

Q. How many of these trips North and South did he take; you say he was walking back and forth all the time? Fifteen or twenty?

A. No, two or three.

Q. Meanwhile Mr. Hermis got down to the south end of the dump, walking a southeasterly direction?

A. Yes sir.

Q. Well, Mr. Brown was behind Mr. Hermis; he was bound to have been was he not?

A. No, sir.

Q. When he would walk back, would he not necessarily get behind Mr. Hermis?

A. No, sir.

I did not see Mr. Brown come up and strike Mr. Hermis over the head when he was down on the ground. That did not happen. Mr. Brown made about 3 of these trips back and fourth, while Mr. Hermis pursued his course to the end of the dump. He got practically to the south end of the dump right on the edge of it; there he fell. Mr. Brown was northeast of him at the time.

Q. Was he on one of these trips back and forth at that time?

A. He had walked about 10 or 13 feet, and then walked back to where Mr. Hermis was lying.

Q. Which way had he walked the 10 or 12 feet?

A. He walked North, and then walked back.

Redirect examination:

When I first saw Mr. Hermis he was coming up the dump. When the first shot was fired Brown was standing on the top of the dump. He was facing Hermis. At the next shot he was practically at the same place. Mr. Hermis was going up the dump in a southeasterly direction. Mr. Brown was standing on the East side of him all the time. He would walk back and forth this way, but facing him all the time.

208 Q. Where was he when the next shot was fired?

A. The third shot?

Q. Yes.

A. The two shots were right close together.

Q. They were still facing each other?

A. Yes sir.

Q. Do you mean to tell the jury that at any time Brown was back of Hermis?

Mr. Dougherty: Your Honor, we object.

Court: That is rather leading.

A. No sir, he was not.

Q. How far was Brown from him when the last shot was fired?

A. He was right at his feet.

Q. How far was his hand that had the pistol from the deceased?

A. It could not have been over three feet.

Q. Counsel asked you about where you were; you said you were near those trestle horses there?

A. Yes sir.

Q. Did you see J. A. Dougherty?

A. Yes sir.

Q. How far were you from him?

A. Three or four feet.

W. W. NEEL, called and sworn, testified:

Direct examination:

My name is W. W. Neel. I am a tailor. I live in Beeville. I never had any conversation with Jim Hermis a short while before he was killed in Beeville. The only business transaction of any kind

I ever had for him I just asked him to haul some dirt for me. 209 That was all. I never had a conversation with Jim Hermis and Ossie Hermis when the name of Bob Brown was mentioned. There never was a conversation when anybody mentioned Bob Brown's name, and Jim Hermis said, "I ought to have *have* been there to have cut his damned head off," or anything similar to that. I do not recall while I was talking in that same connection whether Mr. Pickett came up and made some remark about a hearse passing and Jim Hermis saying, "I'll be the next one."

Cross-examination:

I know Mr. Pickett when I see him passing. Albert McKinney employed at my shop besides myself. He is about 21 years old, medium sized man, dark complected. He stays at my place of business. I know Ossie Hermis. My acquaintance with old man Pickett is very light. I do not know whether Mr. McKinney had heard any conversation of that character with Mr. Pickett. I do not know whether Mr. Ossie Hermis is here.

Mr. Green: I will state that Mr. Ossie Hermis is here; Ossie Hermis is here Mr. Dougherty, do you object to my using him?

Mr. Dougherty: When do you expect to use him?

Mr. Green: Right now.

Mr. Dougherty: I rely upon the rule, Mr. Ossie Hermis has been in Court.

Witness excused.

210 T. E. GREGORY, called in behalf of the Government, testified:

Direct examination:

My name is T. E. Gregory. I am 20 years old. I live in Beeville. I was there the day Jim Hermis was killed, in the business portion of town, in the store. I saw part of the shooting, the last three shots. I was standing outside by the back door when the first shot was fired. John Ruslash was with me. He was standing on the inside just a foot or two from me. I saw the second shot fired. When I first saw Jim Hermis he was staggering toward Bob Brown. His hands were up like this (illustrating). The best I could see they were open.

Q. (Mr. Green showing plat to witness.) Here is the post office site; that is where they were excavating; where is the store in which you worked?

A. Right here.

Q. Does it go out to the alley?

A. No sir, not quite, the building is not the full length of the alley.

Q. Where were you?

A. I was standing right about there.

Q. Was there anything in there, between there, to obstruct your view?

A. No sir; there was a building over here.

When the third shot was fired, I think I had stepped perhaps a few feet further out, and when the fourth shot was fired I was right about the same position. When the fourth shot was fired Johnnie Ruebush had climbed to his wagon, if I remember right. I saw the fourth shot fired. Well, Hermis had fallen to the ground, and Brown was standing at Hermis' right; *Hermis had fallen to the ground and Brown was standing at Hermis' right.* Brown was facing in a direction, I think about like this and Hermis was to Brown's left, and then he turned around about like this (illustrating) and fired the fourth shot at an angle; he fired it down to the ground.

211 Cross-examination:

I was right at the door at the back end of the store, just outside of the door, not over 1½ or 2 feet from the rear door. I heard the first shot and looked over in that direction immediately. I saw Mr. Hermis at that time going up the dump. He was staggering up the dump. I could not say just exactly how far up the dump he had gotten. I know he was not on top of the dump. He was advancing toward Brown, of course, and staggering as he went. I would not say that he was swaying from one side to the other as he went up the dump; he was staggering forward and then backward. As he climbed the dump, he would sway forward and then back, and then he would take another step upward and sway again. I could not say how long it took him to go up that dump in that method. I would not be over five feet from the western edge of the dump to the western edge of the crest of the dump. The dump was about five feet high. Mr. Hermis was going up the dump just a few feet from the north end of the dump. I would not say that he was climbing the dump about 30 or 40 feet down, half way down the dump. He finally got to the top of the dump as I described. He did not continue to sway backward and forward after he got on top of the dump. He then fell on his knees. At that time Mr. Brown was standing on the dump. He did not rise from his knees. He turned around and fell on his hips. He had turned himself in such a position that he was raised on his hips and elbows. I would not be positive how many times he shot at Mr. Hermis before he got to the top of the dump. I think it was the third shot that Hermis fell. I think it was the third shot that he went to the ground. He shot him three times before he got to the top of the dump, and then he fell to the ground on his knees. He had gotten to the top of the dump when he fell. He was not on the western edge of the dump when he fell. He was not right across the dump. He was not on the western side of the
 212 dump. Mr. Hermis came from the northeast side of the dump next to the excavation. I saw it as plainly as I wanted

to see it. When Mr. Hermis came up from the excavation side of the dump and climbed up there and fell on his knees about the eastern edge, Mr. Brown was standing on the dump, on the east side of Mr. Hermis. I would not be positive how far. I should judge it to be about eight feet, something like that. On the eastern edge of the dump, substantially east of it, toward the excavation.

Q. So Mr. Hermis then climbed up the dump, staggering back and forth and Mr. Brown shooting at him twice, and then the third time as he reached the crest of the dump—That is correct, is it?

A. I believe so.

Mr. Hermis did not pass Mr. Brown by. Not that I could see. Brown was East of him all the time; that is, after he got on the dump. I do not know which direction he was from him before he got on the dump. I never seen him. I did not see Mr. Brown at the first shot. I saw him at the second shot. He was on the dump. Mr. Hermis did not come out of the excavation, when he came up the dump. He was not coming exactly from there, but substantially he was. He fell on his knees at the northeastern edge of the dump, right where he came to the top of the dump. Brown was at a point 8 feet from him, somewhere in that neighborhood, and then shot him again. I did not see Brown go up and hit him over the head 2 or 3 times with a pistol. I was not looking after the fourth shot. I was a little bit excited. Between the second and third shot I saw Hermis advancing toward Brown on the dump. He was coming up the dump. Brown was standing on the dump, not right in front of him that I know of. When Hermis got to the top of the dump he was north of Brown, and Brown was on the edge of the dump eight feet south of him I guess. I think the third shot was fired just as he reached the top edge of the dump. I would

213 not be certain about that, because he fell just at that point. He staggered up there swaying backward and forward, and fell on his knees at the east edge of the dump. I know which side the excavation is on. The excavation is on the northeast side of the dump. Mr. Brown stood somewhere in the same position between the third and fourth shot. He could have moved a little, but not perceptibly. Hermis was flat on his back when the fourth shot was fired. He was not exactly cross ways on the dump.

Redirect examination

Q. Where is the excavation?

A. Right there.

Q. What do you call excavation?

A. The dirt that had been thrown out of the hole, the dirt that had been piled up.

Q. Do you call the dirt the excavation?

A. No, sir, the excavation is where the dirt was taken from.

Q. What do you call the dirt?

A. The dump.

Q. Where were you with reference to that dump, make a mark there, make a cross mark?

A. (Witness marks plat.)

Q. Where was Hermis when you first saw him?

A. He was about the location of this little dot there, when I first saw him.

Q. Where was Brown?

A. Just exactly, I would not say, because I did not go over there and mark off the place.

Q. What was the general direction of these two men, without putting marks on there?

A. There is where Brown was located, right about there. (Illustrating.)

Q. Now at the next shot where were they?

A. Hermis was advancing a little in this direction.

Q. And where was Brown?

A. In the same place, right there. (Illustrating.)

214 Q. Where was he at the next shot?

A. The fourth shot?

Q. Yes.

A. He was on the ground.

Q. Whereabouts on the ground do you think he was?

A. Right in here somewhere (illustrating).

Witness excused.

ORVILLE EGBERT, called in behalf of the Government, testified:

Direct examination:

My name is Orville Egbert; I am a physician and surgeon. My training and experience has been acquired at University Medical College, Mo., Bailey University; The Kansas City General Hospital; Emergency Hospital of Kansas City, and I have been practicing five years; I have done postgraduate work at Tulane and Chicago, and Mayo Bros., in Minn. I believe that is *about* the extent of my medical training. I assisted at the post-mortem in this case. It is always necessary in a post-mortem to take down the notes with absolute accuracy, and it is necessary that a physician do that; Dr. Lander made the exposures in this case, and then, before we would jot down our notes as to what the findings were, we would discuss them and go over them, and I kept my hands clean and made the notes. I have a signed memorandum of our findings here; these findings are numbered one and two, and then under two, there is "A," "B," "C," and "D." From my examinations, and knowledge of anatomy and surgery, and physiology, I would say it would not have been possible for a man who had received the wound described in "D," under the second description, being the severance of the aorta, to have been standing and striking with a knife at a man in front of him. My reason for stating that is this: the aorta in this case was severed
215 by the bullet, the bullet of course after severing the aorta was driven against the spine, and was deflected thence into the abdomen through the diaphragm. The severance of the aorta is, of course, one great factor in the shock of death produced; the impact of the bullet against the spine involves just as much in the production

of the shock of instant death. "I take the position in the first place——"

Mr. Dougherty: We object to his contention of the position that he may take.

Court: He is giving his opinion, and it is expert opinion.

Mr. Dougherty: We object, it is not responsive to the question.

Court: Objections overruled.

Mr. Dougherty: Note our exceptions Your Honor. For a further objection, it is not based upon a proper hypothesis.

Court (to witness): You made the examination?

Witness: Yes, sir.

Court: Give your opinion.

Mr. Dougherty: Note our exceptions Your Honor.

Witness (continuing): It is my opinion that the severance of the aorta, which because of its great size, as it is the
216 largest blood vessel in the body, conducting the blood immediately off the heart; the only branches going off from the aorta, before in this case it was severed, are those going from the aorta to the arms, and up into the head. The fact that the aorta which is in the average individual about one-half inch in diameter and because of its peculiar construction stands wide open all the time. Every artery stands wide open; that is where it gets its name the ancients thought it was an air passage. The blood can instantaneously empty from such an enormous opening. The greater shock, besides, of course, the hemorrhage, which produced death would be the instantaneous relief of the blood pressure. Not that it is necessary that blood traverse the entire body, which it does four times in one minute; but the instant relief of that blood pressure would cause the blood to rush from the head and into the thoracic cavity, and so produce the instant shock of death. This is my opinion regarding the severance of the aorta; that the instantaneous shock of death would come principally from the instantaneous relief of the blood pressure which necessarily must have occurred in this case, because of the aorta being completely severed. My opinion further, on that shot is that the bullet in its impact against the spine was sufficient shock to produce immediate unconsciousness. The spinal column, as you know, contains the spinal cord, which is a part of the central nervous system, just as important as the brain, the brain and spinal cord floating in the same fluid. It is my opinion that a blow on the spinal column there would be a greater shock to the more delicate spinal cord than a blow over the brain, such as you administer to an animal when you kill it by hitting it on its forehead; the blow, I take the position would be more of a shock, because the spinal cord is more delicate than the brain which lies in the forehead. These are the two reasons upon which I base my opinion that this bullet which severed the aorta
and which was deflected on the spine into the abdominal
217 cavity would produce the instantaneous shock of death.
have a diagram here showing the position of the heart and

the aorta, it is a front view, with the entire front surface of the body cut away, with the lungs and heart entirely removed; you see where the ribs have been sawed away and everything taken out; you have heard of the diaphragm which partitions the chest from the abdominal cavity; here is that partition; the heart is cut from right here; that is the ascending aorta, to there, the transverse aorta to there, and the descending aorta here; the thoracic aorta ends where it leaves the chest through the diaphragm, becoming the abdominal aorta down here. This is the blood vessel here which leads right up into the head, the carotid artery, and the other carotid goes off right here, into the head, they both lead out of the transverse aorta. Now the spinal column lies right behind here, the aorta coming over almost in front of it, just a little to the left of the spinal column at about the 7th or 8th thoracic vertebra, which is about the level at which the aorta in this case was severed. That is the 8th rib, which would correspond to the 8th thoracic vertebra, and I would estimate the severance of the aorta in this case to be right there, where it goes straight down, and the impact was against the spine, severing the aorta. It would not be possible for a man to be lying on his back and attempting to get up, if he had received such a wound as I have just described, because of the shock of instantaneous death which would be produced thereby. It would not in my opinion, be possible for him, lying on his arm to speak and ask another man not to shoot him, and to strike. Barring the complete severance of the head from the body there would be no other wound, which would produce death so instantaneously as the one described, unless it were an impact such as this one, which would go on and completely sever the spinal cord; the shock might in that case be an instant quicker. Such a wound as I have described would produce death more quickly than a wound in the heart; for this reason,

many heart wounds produce instantaneous death, but many
 218 do not, and the reason I think is that the heart being a muscle that contracts upon itself, would tend to close the opening made through a heart, and a shock, producing immediate unconsciousness is always due to the effect upon the central nervous system, and a bullet going through the heart muscle may not necessarily sever such a nerve trunk as would produce such an instantaneous shock as something else would, for that reason, it is possible to receive a heart wound which would not be instantaneously fatal; but, because of the immediate relief of the blood pressure in the severance of the aorta, and that shock combined, with the other, I think would be instantaneously fatal. Unconsciousness and the shock of death would result instantaneously from the infliction of such a wound as we have been discussing. Supposing that a man was lying on the ground in that position (Referring to counsel's illustrative position on floor), struggling to get up, raising himself on his elbow, and his assailant were standing on the right side of him, at his knees, or at his feet, it is my opinion that if the bullet, from the time it left the muzzle of the assailant's gun until it entered the body was not deflected, it would have inflicted the wound under discussion, while the parties were in that position.

Cross-examination :

We made the post-mortem examination of Hermes' body on the day of the homicide, at the undertaking establishment in Beeville: Dr. Lander and the undertaker were present, I think there were two or three others, but I do not remember who they were; Dr. Lander made the exposures, he cut and opened the chest; I do not mean to say that I had nothing to do with it; I handled the probes, but he made the exposures that we both might see, he with his soiled hands, and I with my hands clean to be able to make the notes. We both

219 handled the probes, putting the probes through the bullet tracks. The course of the bullets which inflicted the two superficial wounds, was from right to left, after they entered the body; they were both practically upon the same course; the upper one was perhaps one and one-half inches above the lower. I could not tell whether or not the upper superficial would cut about the first buttonhole, below the collar, as the body was stripped; if the button line fell directly over the breastbone it would be to the left of that a little. The point of entry was one inch to the left of the upper portion of the breastbone; the course of the bullet was outward and backward, and it lay under the skin right on the point of the shoulder; that was the upper wound. The point of entry of the next shot was two inches above the left nipple, and the bullet coursed under the skin, around under the armpit, and rested at the back, what we would speak of as the posterior; the bullet located under the skin; the general course as I have indicated it, of the superficial wounds was from right to left; neither one of these superficial wounds entered the cavity of the chest, they would not produce immediate death; the only possible danger that could have resulted would have been some species of infection. Of course the injured party would have been incapacitated temporarily, but the only serious thing that might involve his life at a later date would be infection; they did not cut any arteries of any consequence. The first wound spoken of under number two, is a bullet wound on the anterior surface of the thigh; left. The course of that bullet was very slightly downward; very little departure from a straight line; I describe these wounds with reference to the body being erect, in its normal position; the course of this bullet in the thigh was practically horizontal, with a slight; a very slight, departure downward; there was a less departure in that than in any other of the wounds; it was about parallel with the wound severing the aorta; that being about the same angle downward. This wound is a complete fracture of the femur; I mean by that a clear break, the bone could be picked up

220 and worked back and forth. With such a complete fracture a man could not stand erect, he would necessarily fall. (Witness illustrates following testimony by exhibiting diagram of human chest before referred to). The heart extends in front of the descending aorta at the third and fourth interspaces; the fourth and fifth I should say; the heart and lungs have been removed in this diagram. I reported no injury to the heart in my examination

The point of entry of the bullet was the fifth interspace in front; here (illustrating) is the 5th interspace, right there close to where the apex of the heart would lie normally; I might explain that it is peculiar that the heart in this case was not injured, it evidently was in a state of contraction at the time the shot was received, else the heart would have been injured; the shot penetrated where the point of the heart should have been, except in a normal state of contraction. I do not know why the heart was not injured; my theory is that it was contracted at the time the shot was received. In a state of relaxation or death the apex of the heart would be down there, where the bullet entered; I am not attempting to say why the bullet did not hit the heart, but it did not. The heart in normal life at the sternal end of the 4th, and 5th interspaces is in front of the thoracic aorta, for about an inch from the sternum, or breastbone. That shot entered about one inch to the left of the sternum. That portion of the thoracic aorta, or the aorta which is in the chest, just before it goes through the diaphragm into the abdominal cavity, is what I term the last portion of the thoracic aorta. This is the last portion of the thoracic aorta here (Illustrating). Where the thoracic aorta ends, is where it enters the abdominal cavity, and the last portion of it is that which lies nearest to the abdomen. My description of the last portion may be a little broad, in confining my description I should say the last third of the thoracic aorta, as being the last portion; that is merely my division. The aorta was severed at about the 7th dorsal vertebra. The bullet entered at a point where in a normally relaxed condition the apex of the heart would be, and it severed the aorta down in its
221 last third; but you must remember that the plan of the body, that the heart sits considerably in front of the aorta, and the general direction of the bullet being downward would account for my statement. The fifth interspace in front would be about opposite the 7th dorsal vertebra, and though the bullet entered at the 5th interspace in front, and passed where the apex of the heart should be, the severance of the aorta need not necessarily be right behind where the apex was. The aorta descends in practically a perpendicular course downward into the abdomen. The course of the bullet from the point of entry in the 5th interspace was such that it cut the aorta some place in the lower third. The lower third of the aorta was severed by the bullet about two inches above the diaphragm; that is, about the middle of the last third of the thoracic aorta. The division of the aorta into thirds is about as follows: the upper portion will start at about the second thoracic vertebra, and will extend over about the 2nd and 3rd; just about the second and third vertebra, I would estimate the third; I am trying to cut the aorta into three equal parts. The length of the thoracic aorta is about nine inches, and that would allow about three inches for each third, that would throw the middle of the lower third $1\frac{1}{2}$ inches, or if my estimation is not exactly correct, two inches from the diaphragm. I would estimate that at the 5th interspace it is about five inches from the aorta to the outer skin at the front of the body,

on the average man; I should judge it was about that far in this case, there were no measurements taken. The vital organs do not fit snugly in the thoracic cavity; there is enough space in the chest cavity to allow the opening and contraction of the heart, and also the rising and falling of the lungs in breathing, so necessarily there must be considerable space. If you would consider the lungs at rest and the heart at rest, there would be quite a little space in there, an irregular space. That space I think would be more than a gill.

222 Court: I fail to see the illumination of this subject matter with all these dissertations; if we are going to take a course in anatomy we had better prepare for it.

Mr. Dougherty: Note our exceptions Your Honor.

Witness (continuing):

The discharge of blood from the severed thoracic aorta would possibly be slightly slower, due to the congestion or pressure developed by the discharge into the chest cavity, than it would be if the severed end were on the outside. The volume of the blood is as 13 to 1 to a man's weight. In a man weighing about 165 pounds there would be about 13 pounds of blood. The thoracic aorta is about one half inch in diameter. In determining the time in which death would result from a severance of the thoracic aorta it is impossible to leave out the question of shock, and only consider the time required to drain the blood vessels. I cannot say how soon unconsciousness and death would result from such a wound merely considering the hemorrhage, because with a severe hemorrhage there is a question of shock, and I cannot answer without that question being involved. I do not know whether or not that 13 pounds of blood is equivalent to $7\frac{1}{2}$ quarts. I did not trace the bullet at all after it went through the diaphragm. My written notes do not include a statement as to the impact of the bullet on the spine. My statement discloses that the bullet entered the abdominal cavity through the diaphragm, about one half inch to the left of the spine, and that we never followed it from there on. It hit the spine in the chest cavity, and was by that deflected through the diaphragm into the abdominal cavity, establishing an angle when it hit the spine from its general course, to that course taken into the abdomen of about 45 degrees. I do not know why that was not put into our statement at the time I wrote it. That was a careful deliberate statement. That was not a second statement. I did not typewrite this at the time; I made

223 my notes, but this as I remember is the only one that was made from the original notes, I do not recall any other, there might have been a copy or two. I do not know whether I furnished you with a copy of this first statement. (Counsel shows paper to witness). That is not a duplicate of my statement; I am quite sure that I never furnished you with any statement, that is my recollection. I have refreshed my recollection, but I do not recall bringing you any statement, or coming later on and giving you another statement; you have got me confused with Dr. Lander. I did not do it. I said you had me confused with Dr. Lander, because I had

pened to hear that Dr. Lander was in your office and gave you a statement. This statement bears no reference to the bullet having struck the spine; it is a signed statement. I am testifying here as to my findings as to the course of this bullet; I present this statement as having found what is stated here, evidently in addition to what was on here, there were other findings as to the bullet hitting the spine.

Q. Do you know of any fact that would have been more important and necessary for record than the striking of the spine by the bullet?

Mr. Green: That is argumentative Your Honor, I think.

Court: This is cross-examination, and he can get it in; he can give any reason.

Witness (continuing):

The striking of the bullet against the spine was such an important matter as should have been recorded by me as a physician making a post-mortem examination; but I evidently did not record it. We did not open the abdomen at all. We say that the bullet had entered the abdomen through the point of the diaphragm. The bullet entered the abdomen about 2½ inches from where it severed the aorta. I have had five years' practice. I am twenty-nine years old. My entire practice of medicine has been in Beeville. I have had a few cases of gunshot wounds during that period; I have had a little more careful study of gunshot wounds since I have been in the army. I have not had any cases of severance of the thoracic aorta since I have been in the army. I have been studying from books; we have principles in our profession by which we figure out our conclusions from a hypothesis, just as you have in yours. I do not know of any case where a man has been shot in the heart, and the right side of the heart torn away, where the injured party has lived for a period of from five to ten minutes; I can give my opinion. I have seen one or two cases shot through the heart, as well as having studied about the matter, but I am not in a position to say how long they lived, so that is not worth while. My relations to Mr. Hermis were friendly, he was my patient. In my findings the statement as to the cause of death is as follows: "Abdomen was not opened for examination, as cause of death was ascertained by finding the aorta severed." I did not specifically mention the question of shock, you cannot separate shock from hemorrhage; many men take the position that shock and hemorrhage are inseparable, so that to say that shock is absent here is impossible, because with that hemorrhage there was shock, which in this case produced the shock of death. I am making the explanation that shock is in here, because of the hemorrhage which is inseparable from shock. There is no use mentioning for instance that the heart stopped beating, and the man stopped breathing, and closed his eyes; shock is not specifically mentioned, but it is as evident as those things are.

Witness excused.

225 B. W. KLIPSTEIN, called in behalf of the Government, testified:

Direct examination:

My name is B. W. Klipstein. I live in Beeville. I am in the banking business. I am president of the First National Bank. I have lived there nearly thirty years. I knew Jim Hermis in his life time. I have known him I suppose for 12 or 15 years. I was acquainted with his general reputation in that community as being a peaceable law abiding man. I know the reputation of the deceased. He had the reputation of being a peaceable and inoffensive citizen. I do not think he was one likely to execute a threat to take life. I consider his reputation good in the community.

Cross-examination:

My business keeps me in the bank pretty well. I do not know whether Mr. Hermis' reputation was, if he ever had any difficulty with any one, that he was unrelenting and disposed to attack him. I knew nothing about the case at all, knew nothing about his disposition or, his inclination.

Redirect examination:

I am giving the general reputation that he bore in the community.

J. C. WOOD, called in behalf of the Government, testified:

Direct examination:

My name is J. C. Wood. I live in Beeville, have been there about thirty years. I used to be in stock business, but I sold out and rented my ranches. I knew James P. Hermis in his life time. I
226 knew him twenty-five years. I was acquainted with his general reputation in that community, as being a law-abiding inoffensive man. That reputation was good.

Cross-examination:

Q. I will ask if his reputation was not, that if he had ever had it in for a man; was angry with him; that he was unrelenting to him?

A. No, sir, I do not consider it so.

Q. I am speaking of what the community considered?

A. I can only speak for myself, not for the community.

Q. Is that what you are speaking about now; what you thought about it?

A. Yes, sir.

Q. Not the community?

A. Yes, sir.

Q. Speaking in reference to the community, was he regarded as an unrelenting man towards one whom he considered his enemy?

A. I do not look at it in that light.

Q. Now, how you looked at it; how about the general public?

A. I do not know how the general public looked at it; I had a general idea.

Q. You are taking an active interest in the prosecution Mr. Wood?

A. Yes, sir.

JAMES WRIGHT, called in behalf of the Government, testified:

Direct examination:

My name is Jim Wright. I live at Berclair, right across the line in Goliad County, about 15 miles from Bee County. I am in the farming and cow business. I got to Beeville frequently, was

227 borned and reared there. I am very well acquainted there. I knew Hermis in his life time. Knew him ever since I could remember. I was acquainted with his general reputation in that community as being a law-abiding, peaceable, inoffensive citizen. His reputation was good.

Cross-examination:

I took no interest whatever in the prosecution of this case.

C.F. TROY, called in behalf of the Government, testified.

Direct examination:

My name is Charles Troy. I live in Beeville, Texas. I have lived there 25 years. I am County Judge, since November of last year. Before that I was county attorney four years. I knew Hermis in his life time. I have known him since far back as I can remember, about 20 or 22 years. I was acquainted with his general reputation in the community as being a peaceable, law-abiding inoffensive citizen. That reputation was good.

Government here rests its case.

S. B. HARDY, recalled by the Defendant, testified:

Direct examination:

After the difficulty I walked over to where Hermis was. When I got there Hermis had just fallen over backwards, and Mr. Miller was sitting down on the dump. When I got to Miller, Hermis was still living. I do not believe he lived over 3 or 4 minutes. He was dying when I got there. I could tell from his actions. To the best of my recollections he lived 3 or 4 minutes after I got to him.

228 Cross-examination:

Q. What was his position, show the jury?

A. He was lying in Mr. Miller's right arm, and Mr. Miller had his arm under his head; he was sitting on the dump, and when I

stepped up there, the first I noticed, he just did that way (Witness illustrates by gasping).

Q. How many times did he do that?

A. Probably three or four times.

Q. Do that just as many times as he did, and show how long it was?

A. When I got to him they were calling for a doctor, and I said there would be no use. He first gasped like this (Illustrating), and then like this (Illustrating), and then like this (Illustrating); gasped three times.

Q. That is about the number of gasps, and the length of time?

A. Yes, sir.

Q. And if that is three or four minutes, it was three or four minutes, and if less, it was less?

A. It was somewhere in the neighborhood of that; he just gasped a few times.

Redirect examination:

I should say that I had walked about 40 feet over to him. I was standing about that far from him, when the last shot was fired; it might be a little more or a little less.

Bill of Exceptions No. XII

Be it remembered, that after all the evidence was heard, and after the Government and defendant had rested their testimony, and while the jury was at the bar, and before the Court gave his charge to them, and before the argument of counsel began, without waiving the motion for instructed verdict, the defendant presented to the Court a written request that the Court give in charge to the jury
229 his special charge No. One, which is as follows; omitting caption and signatures.

Gentlemen of the Jury:

You are instructed that the defendant, Robert B. Brown, is presumed by law to be a person of good character and this presumption remains with him throughout the progress of the trial.

Refused Jany. 18th, 1918.

WM. B. SHEPPARD,

Judge.

Be it further remembered, that there was no evidence introduced into the cause as to the good or bad character of the defendant, and the Court nowhere in his charge to the jury in the cause or in any special charge, charged on the question of presumption of good character of the defendant.

And the Court refused to give said Special Charge No. One, requested by defendant, and in open Court the defendant, then and there, while the jury was at the bar, excepted to the ruling of the

Court, and saved his exception to such action of the Court, which exception was allowed.

Bill of Exceptions No. XIII.

Be it remembered, that after the aforesaid cause proceeded to trial, and while the jury was still at the bar, and before the Court gave his charge to them, and before the argument of counsel began, and without waiving the requested motion for instructed verdict, the defendant presented to the Court a written request, that the Court give in charge to the jury his Special Charge No. Two, which charge, omitting formal caption and style, is as follows, to-wit:

Gentlemen of the Jury:

The defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence, beyond a reasonable
230 doubt; and in case you have a reasonable doubt as to the defendant's guilt you will acquit him, and say by your verdict "Not Guilty."

Refused Jan. 18th, 1918.

WM. B. SHEPPARD,

Judge.

The Court refused to give said Charge No. Two, and to such ruling of the Court the defendant then and there in open Court excepted.

Bill of Exceptions No. XIV.

Be it remembered, that after the aforesaid cause proceeded to trial, and after all the evidence was heard, and after the Government and defendant had rested their testimony, and while the jury was still at the bar, and before the Court gave his charge to them, and before the argument of counsel began, and without waiving the requested motion for instructed verdict, the defendant presented to the Court a written request that the Court give in charge to the jury his Special Charge No. Four, which was as follows, omitting formal caption and signatures:

Gentlemen of the Jury:

You are instructed that in considering the guilt or innocence of the defendant, you should view the facts and circumstances of the case as nearly as you can from the standpoint of the defendant, and put yourself, as nearly as you can, in his place, and see and consider the situation as in your judgment it may at the time have appeared to him, and if, upon so doing, you cannot say from all the evidences before you that you are convinced beyond a reasonable doubt of the guilt of the defendant, then you should find him not guilty.

Refused Jan. 18th, 1918.

WM. B. SHEPPARD,

U. S. Judge.

231 And be it remembered, that the Court nowhere in its charge included said special charge in his charge to the jury, and refused to give the same to the jury, and to such refusal the defendant excepted, and such exception was allowed by the Court.

And be it remembered, that said Charge and the Request therefor was based upon the testimony of the following witnesses, at the following places in the record, under the statement setting out the evidence heard at the trial of said cause; to-wit:

The testimony of John S. Fenner, at page 146 hereof.

That of J. A. Doughty, at page 148 hereof.

That of Ike Archer, at page 152 hereof.

That of Victor Gabco, at page 155 hereof.

That of Diego Rodriguez, at page 157 hereof.

That of Homer Lee McKinney, at page 160 hereof.

That of Will Nutt, at page 161 hereof.

That of Joe Thornton, at page 163 hereof.

That of J. M. Pickett, at page 165 hereof.

That of John Murphy, at page 176 hereof.

That of Aurelio Padio, at page 167 hereof.

That of John Ruebush, at page 168 hereof.

That of David Stockbridge, at page 173 hereof.

That of James McCullum, at page 177 hereof.

That of Jack Carvel, at page 179 hereof.

That of Rufus Taylor, at page 181 hereof.

That of Paul Perkins, at page 182 hereof.

That of Oscar Francis, at page 185 hereof.

That of Hiram Cheney, at page 186 hereof.

That of Dr. Harry G. Haney, at page 189 hereof.

That of Dr. H. R. Giles, at page 191 hereof.

That of Robert B. Brown, at page 195 hereof.

That of S. B. Hardy, at page 227 hereof.

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Bill of Exceptions No. XV.

And be it remembered, that the following is the whole of the Court's charge, which he gave to the jury in charge in this cause, with reference to the alleged offense charged and the indictment thereon:

In the District Court of the United States, for the Southern District of Texas, Corpus Christi Division.

UNITED STATES

VS.

ROBT. B. BROWN.

Charge to the Jury.

1. This indictment against Robt. B. Brown, the defendant, now before the Court, charges him with the murder of one James P. Hermes, on a certain lot, tract, or parcel of land situated in Beeville, Bee County, Texas, within the Southern District of Texas, Corpus Christi Division, said land being more particularly described in the indictment. It is charged that said lot, tract, or parcel of land was then and there, and before such time, to-wit: on the 7th day of May, A. D. 1917, ceded to the United States, and was then and there, and now is, under the exclusive jurisdiction of the United States.

This Court could not entertain jurisdiction of the offense charged against the defendant, unless it was alleged and proved to have been committed on the lot, tract or parcel of land, exclusive jurisdiction over which had been so ceded to the United States. I therefore charge you as a matter of law, that the instrument executed by the Governor of the State of Texas, which has been produced in evidence in this trial, cedes to the United States exclusive jurisdiction over the land and territory contained within the boundaries of the lot,

tract, or parcel of land, described in the indictment, but, like
233 the other material facts charged in the indictment, the burden is upon the United States to prove beyond a reasonable doubt that the offense (if any offense was committed) was within the limits of the boundaries set forth in the cession of jurisdiction from the State of Texas, to the United States, of the said lot, tract, or parcel of land, described in the indictment. If you are satisfied, that James P. Hermes was killed by the defendant, at or within a place under the exclusive jurisdiction of the United States, it will next be your duty to inquire into the facts and circumstances of the alleged killing, in order to determine the question of the guilt or innocence of the defendant, Robt. B. Brown.

2. To this indictment, as above described, the defendant interposes a plea of "not guilty," and this plea puts upon the United States the burden of proof; the legal presumption of innocence is with the defendant, and accompanies him throughout the trial, until it is overcome by evidence which satisfies your minds beyond a reasonable doubt of the truth of the charge.

3. The offense charged in this indictment is murder in the first degree, and to meet the evidence developed on the trial of this case, and for the purposes of this prosecution, such murder may be defined, under the statute, as the unlawful killing of a human being,

with malice aforethought. You will observe from this definition, that to constitute murder in such degree there must be malice aforethought, and this may be said to exist, where one, with a sedate and deliberate mind, and formed design, doth kill another, which formed design is evidenced by external circumstances, discovering that inward intention, as, lying in wait, arming ones self, antecedent menaces, former grudges, and concerted schemes to do bodily harm. It rarely, if ever happens that such malice is proved upon the trial of a case. The existence or non-existence of malice is a matter to be determined by the jury from a consideration of all the facts in

234 evidence. The proof of homicide must show the facts under which the killing was effected, and from the facts and circumstances surrounding the killing, the jury may infer malice or its absence. Malice in connection with the crime of murder is but another name for a certain condition of a man's heart or mind; and, as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of the killing, is to infer it from the surrounding facts, and that inference is one of fact for the jury. The malice which distinguishes the crime of murder in the first degree, must be "aforethought." It implies premeditation, a prior intent to do the act. It may have existed but for a moment—an inappreciably brief period of time, or longer. No limit has been or can be fixed as to its duration. If it in fact exists for any period, however brief, the killing would be murder in the first degree, but if malice is wanting, the homicide would be of a lower grade.

4. Under the charge contained in this indictment, you are not confined in your application of facts and circumstances of the case to murder in the first degree; you may, if you find the evidence inadequate to justify a conviction of this offense, then consider the facts as adduced before you upon the trial, in relation to one of the lesser degrees of homicide denounced by the statute; viz: murder in the second degree, or man-slaughter.

5. Murder in the second degree, which, for the purpose of this prosecution may be defined, as, the unlawful killing of a human being, when perpetrated by an act imminently dangerous to the life of another, and evincing a depraved mind, regardless of human life, although without malice aforethought premeditated design to kill any particular person, as killing resulting from the dictates of a wicked, depraved and malignant spirit; a heart regardless of social duty and fatally bent upon mischief, although the accused may have had no spite or ill will against the deceased.

235 6. Manslaughter is defined under the federal statutes to be, the unlawful killing of a human being without malice express or implied. Manslaughter may be either voluntary, or involuntary. Manslaughter is committed when a homicide occurs, upon a sudden quarrel, or in the heat of passion. The law, in recognition of the frailty of human nature regards a homicide committed under the influence of sudden passion, or in hot blood, produced by adequate cause, and before a reasonable time has lapsed for the blood to

cool, as an offense of a less heinous character than murder; but, if there be a sufficient time for the passion to subside, and shaken reason to resume its way, no such distinction can be entertained.

7. Therefore, Gentlemen of the Jury, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, upon the tract of land described in this indictment, with malice aforethought, and from a premeditated design to effect his death, shot and killed the said James P. Hernes, then you should find the defendant guilty of murder in the first degree, as charged in the indictment.

8. If you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, upon the tract of land described in this indictment, shot and killed the said James P. Hernes, without an express intent or design to effect his death, but as the result of a wicked, depraved and malignant spirit, a heart regardless of social duty, and fatally bent upon mischief; then you should find the defendant guilty of murder in the second degree.

9. If you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, upon the tract of land described in this indictment, shot and killed the said James P. Hernes, upon a sudden quarrel, or in heat of passion, and without malice or lawful excuse, then you will find the defendant guilty of voluntary manslaughter.

236 9-A. If you find from the evidence that the fourth shot was fired accidentally, or if you have a reasonable doubt as to whether it was fired accidentally, and a wound thereby inflicted, then you are instructed that said fourth shot cannot be further considered by you in determining the guilt or innocence of the accused, unless you find that the said shot was fired so carelessly and negligently as to render the defendant guilty of involuntary manslaughter; that is to say, the infliction of death in the commission of a lawful act, which might produce death, without due circumspection.

10. Under the plea of not guilty, the defendant is entitled to show, if he can by the evidence, that the homicide was committed in the lawful defense of himself. But, it is necessary to remember, in considering the question of self defense, that the party assaulted is always under the obligation to retreat, so long as retreat is open to him, provided he can do so without subjecting himself to the danger of death or great bodily harm.

11. If you believe from the evidence, that the defendant, shot and killed James P. Hernes, at the time when the said James P. Hernes was making an assault upon the defendant, with a dangerous or deadly weapon, that is, with a weapon capable of inflicting death or great bodily harm, and under such circumstances as to put a reasonable man in the position of the defendant in fear of his life, or great bodily harm; and such circumstances would appear to a reasonable mind, as making retreat or attempted retreat dangerous to his

personal safety; then the defendant would be justified in standing his ground, and resisting the attack with all necessary force; even to the taking of the life of his assailant; and in such case you would find the defendant not guilty.

12. But, unless the assault was made by the deceased upon the defendant with a dangerous or deadly weapon, and under circumstances which would put a reasonably prudent man in fear of his life or great bodily harm, there would be no justification for taking the life of James P. Hermes, and if you find from the evidence, that James P. Hermes was about to assault the defendant, without a dangerous or deadly weapon, and the defendant shot and killed James P. Hermes with a premeditated design to effect his death, then such killing would amount to murder, and the instructions as to this crime previously given would apply.

13. If you believe from the evidence that James P. Hermes, did make an assault upon the defendant unarmed, which the defendant resisted, and in the conflict shot and inflicted wounds which felled Hermes to the ground, and after the said Hermes was upon the ground, wounded, but not fatally so; and in the absence of any circumstances which would put a reasonably prudent man in the position of the defendant in fear of death or great bodily harm, the said defendant again shot and killed the said James P. Hermes, deliberately, and with a premeditated design to effect his death, though such design may have existed but for a moment; then you should find the defendant guilty of murder in the first degree, as previously defined.

13-A. If you believe from the evidence that James P. Hermes, did make an assault upon the defendant unarmed, which the defendant resisted, and in the conflict shot and inflicted wounds which felled Hermes to the ground, and after the said Hermes was upon the ground; wounded, but not fatally so; and in the absence of any circumstances which would put a reasonably prudent man in fear of death or great bodily harm, the said defendant again shot and killed the said James P. Hermes in the heat of passion resulting from the quarrel; and without time for reflection or premeditation; then you will find the defendant guilty of voluntary manslaughter; as above defined.

238 13-B. If, however, you believe from the evidence, that at the time of the killing it would have appeared to a reasonably prudent man, situated as the defendant was, and in the circumstances of the defendant, that the deceased was armed with a deadly or dangerous weapon, and the defendant had reasonable ground to believe that the deceased, from the mode and manner of the use of such weapon, was about to inflict on defendant, or that there was apparent danger of his inflicting upon defendant death or some serious bodily injury; and retreat was apparently dangerous, then you are instructed, that under such circumstances the defendant would be justified in resisting the assault with all necessary force, even to the extent of killing the assailant.

13-C. If you believe from the evidence, that previous to the homicide there had been communicated to defendant threats of the deceased to kill defendant or do him serious bodily harm, and that at the time of the difficulty the acts and words of the deceased, accompanied with demonstrations evincing a purpose to put into effect such threats in such a manner as to create in the mind of a reasonable man a reasonable apprehension or fear that the deceased was then and there about to carry such threats into execution and to inflict upon defendant death or serious bodily harm; then you are instructed that the defendant had the right to use such force as would be reasonably necessary to protect himself; provided that he was unable to retreat and avoid the conflict, or that an attempt to do so would have appeared dangerous to a reasonable man under the circumstances of the attack.

14. If you believe from the evidence that at the time of the homicide the deceased made an assault upon the defendant with a deadly weapon, and defendant's knowledge of the character and disposition of the deceased would have caused a reasonable man in the situation of the defendant to have entertained fear of death or serious
239 bodily injury; when retreat or any attempt to retreat would have appeared dangerous to a reasonable man, and that, acting under such reasonable fear, the defendant killed the deceased in repelling the assault, then you should find the defendant not guilty.

15. If the deceased was armed at the time of such assault, and was making such an attack on defendant, with a deadly weapon, as would put a reasonable man in fear of death or serious bodily harm; then the defendant would be justified in believing that the deceased intended to kill or inflict serious bodily harm upon him, and if retreat could have appeared to a man of reasonable prudence, in the position of the defendant, as involving danger of death or serious bodily harm, then the defendant was entitled to stand his ground, and repel force with force, even to the extent of taking the life of his assailant.

16. The Jury is the sole and exclusive judge of the credibility of the witnesses, and the weight to be attached to their testimony; you have heard the witnesses testify; you have seen them upon the witness stand and observed their manner of testifying, and it is your province to determine from their testimony, and from their attitude and manner upon the witness stand, what interest or bias any witnesses may have exhibited for one side or the other of the case; and to judge and determine the credibility of such witnesses, and how far their testimony may be influenced from interest or bias, and thus arrive at a conclusion as to the weight to be given testimony of any particular witness.

If there is a conflict in the testimony, and in this case there has developed great conflict as to the circumstances surrounding the killing; it is your province to reconcile that conflict if you can, granting to each witness a purpose to tell the truth; if it is possible for the jury to do so in the light of all the evidence, and the strong probabilities of the case. But, if you cannot reconcile it, then it is your

240 province to accept that as true which appears to you as the most reasonable and probable in the light of the most consistent and reasonable testimony, and where you think the truth lies, and, if you cannot credit the testimony of all the witnesses by the standing of reason, probability and experience, in the light of all the facts and circumstances of the case; it is your province to discredit that which you think is unworthy of credit; and to accept and believe that which comports with reason and common sense, and your own experience in the ordinary affairs of life.

17. When the defendant takes the witness stand in his own behalf, which he may do at his own election, and not otherwise, he becomes a witness in the case, as any other witness called to testify, and is subject to cross examination, and same rules of credibility as other witnesses; but in considering the testimony of the defendant with the other evidence, you may consider the interest which he has in the result of the trial; and weigh it in the light of such interest, and give it such credit as you deem under the circumstances it is entitled to.

18. The jury in arriving at a verdict on the proven facts in a given case, are not restricted alone to the palpable facts, but may consider the inference which may be drawn from such facts; nor is a juror expected to lay aside his common knowledge of men, nor his common sense and experience in the affairs of every day life; but in considering the verdict he may use these attributes in the application of the testimony, in an endeavor to reach a proper verdict on the entire evidence.

19. You have already been instructed Gentlemen, that in order to justify you in rendering a verdict of guilty, your minds must be satisfied beyond a reasonable doubt, of the truth of the charge in the indictment. It is perhaps easier to understand than to explain what a reasonable doubt is. It is not meant that all doubt should
241 be excluded. It is impossible in the determination of a controverted question where there has been testimony supporting both sides, to be absolutely certain. You are only required to decide the question submitted to you upon the strong probabilities of the case. All the probabilities may not be so strong as to exclude all doubt or possibility of mistake or error, but as to exclude every reasonable doubt. You cannot create sources of doubt by resorting to trivial suppositions, conjectures or possibilities, which were not found in the testimony, and different from that established by the evidence. The fact that you have taken an oath as a juror imposes no obligation on you to doubt where you would have no doubt if you were not on the jury, you would not disbelieve as a juror, if from the evidence you would believe as a man. A reasonable doubt is an actual doubt, that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you feel then uncertain, and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any

matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit.

20. With regard to your verdict, Gentlemen: If you find the defendant guilty of murder in the first degree, as I have previously defined it; then your verdict would be, "We the jury find the defendant guilty of murder in the first degree," but in this case it is your province to qualify your verdict if you so desire by adding thereto the words "Without capital punishment," and a verdict thus qualified reduces the punishment of the defendant, to imprisonment for life.

21. With regard to murder in the second degree, or manslaughter, the form of the verdict would be similar, but in this event there can be no qualification thereof.

242 Given Jan. 18th, A. D. 1918.

WM. B. SHEPPARD.

Judge.

Indorsed:—Charge of the Court. Filed 18 day of Jany., 1918.

The main charge above set out was supplemented orally as follows:

"Therefore, if you find from the evidence beyond a reasonable doubt, that it was not murder in the first degree, but murder in the second degree, the form of your verdict would be, "We the jury find the defendant guilty of murder in the second degree," but, if you should find from the evidence, and all the facts and circumstances that it was not murder in the second degree, but it was manslaughter, voluntary or involuntary, your verdict would then read, "We the jury find the defendant guilty of voluntary manslaughter," if it was supported by the testimony, or "We the jury find the defendant guilty of involuntary manslaughter." If it is for the defendant, the form of your verdict will be, "We the jury find the defendant not guilty."

The following special charges, omitting caption and signatures, were given at the request of the Defendant:

Gentlemen of the Jury:

You are instructed that there is evidence in the case that the deceased threatened to kill the defendant, or do him some serious bodily injury. As to some of such threats, it appears that they were not communicated to the defendant before the homicide.

You are instructed that the uncommunicated threats in evidence are admitted in evidence for the purpose of being considered by

243 you in determining the intent or purpose of the deceased at the time of the difficulty, and in determining who was probably the aggressor in the difficulty.

Given. Jan. 18th, 1918.

WM. B. SHEPPARD,
Judge.

Indorsed:—Defendant's Requested Charge No. 3. Filed Jany. 12, 1918.

Gentlemen of the Jury:

If you believe from the evidence that previous to the homicide there had been communicated to the defendant threats of the deceased to kill, or do some serious bodily injury, to the defendant, and thereby there was created in the mind of the defendant a reasonable apprehension or fear that he was in danger of losing his life, or of suffering serious bodily injury at the hands of the deceased, and that acting upon such reasonable apprehension, or fear, the defendant armed himself for the purpose of protecting himself from such threat or apparent danger, then you are instructed that the defendant had the right, under the circumstances, to arm himself in order to protect himself from such danger, real or apparent.

Given. Jan. 18th, 1918.

WM. B. SHEPPARD,
Judge.

Indorsed:—Defendant's Requested Charge No. 11. Filed 18th day of Jany., 1918.

Be it further remembered, That after the evidence had been introduced in said cause, and after the Government and defendant had rested their testimony, and while the jury was still at the bar, and before the Court gave his charge to the jury, he submitted the same to the defendant, and before said main charge was given to the jury, the defendant then and there in open Court presented to the Court the following exceptions to said main charge, which were all overruled by the Court:

244 In the United States District Court, Southern District of Texas.

No. 82. D. Cr.

UNITED STATES OF AMERICA

vs.

ROBERT B. BROWN.

Now comes the defendant in the above styled and numbered cause, and before the reading of said charge to the jury, excepts to the same for the following reasons, towit:

1st. Because the charge does not limit the jurisdiction of the United States to a lot or parcel of land over which exclusive jurisdiction had been ceded for one of the specific purposes for which cession is permitted by the Revised Statutes of the State of Texas, and the Constitution of the United States.

2nd. Because the charge is erroneous, in that it declares that the instrument executed by the Governor of Texas ceded exclusive jurisdiction to the United States, (a) Because it has not been shown that the United States ever acquired title to the tract in controversy, and (b) because the instrument of cession does not appear to have been made for one of the express purposes, to-wit, a post office, for which cession was or is permitted by the laws of this state, or the Constitution of the United States, but appears to have been for the general public purposes of the United States, and therefore beyond the power of the Governor, and (c), because it appears that the cession was by the Governor and not by the Legislature of the State of Texas, for all of which above reasons the cession of jurisdiction over said tract or parcel of land to the United States was void.

3rd. Because the charge does not submit the offense of assault with intent to murder to the jury.

245 4th. Because the charge requires the defendant to retreat, and this is an improper restriction on the right of self defense, appearing that deft. was rightfully at the scene of the homicide.

4th-a. Because the charge, page 6, improperly imposes upon deft. a greater burden of proof than is required in so far as it requires deft. to show that Hermis made the assault upon deft. beyond a reasonable doubt.

5th. Because that part of the charge, wherein the Court instructs the jury that "under the plea of not guilty the defendant is entitled to show, if he can by the evidence, that the homicide was committed in the lawful defense of himself," is a restriction on the law of self defense and an intimation which is calculated and likely to create in the minds of the jury the impression that there is a doubt in the mind of the Court as to whether said defendant can show by the evidence, that the homicide was committed in self defense.

6th. Because the repetition of the instruction as to murder contains in the two succeeding paragraphs after the paragraph in which the Court defines self defense has the effect to and does unduly limit and restrict the right of self defense, and unduly and calls the attention of the jury and lays special emphasis on the elements constituting the offense of murder.

7th. Because the restriction by the Court of the law of self defense and the use of the expression "That James P. Hermis did make an assault upon the defendant unarmed" is calculated and likely to and does create the impression that in the mind of the Court that said deceased was unarmed at the time, and places undue emphasis on the issue as to whether said Hermis was armed or not.

Because the duty to retreat is imposed upon the defendant when it is shown that he was rightfully at the scene of the homicide when he was assaulted.

246 Because the Court does not charge upon the effect of the previous assaults made upon deft. by the deceased, and does not charge upon the effect of the uncommunicated threats.

Because the charge throughout imposes a greater burden of proof than is required by law, in that it requires deft. to show beyond a reasonable doubt that deceased assaulted deft. before defendant's right of self defense arose.

Because the charge, the issues as to the culpability resulting from death by reason of the death of deceased from the different shots fired is not submitted, and there is evidence to show that even if the homicide was unjustifiable, still it would be of different degrees according as it resulted from the 1st, 2nd, 3rd or 4th shots.

Respectfully submitted,

DOUGHERTY & DOUGHERTY,
Att'ys for R. B. Brown, Deft.

Said exceptions were indorsed as follows: Exceptions to the Court's charge. Filed Jan'y 18, 1918.

Bill of Exceptions No. XVI.

Be it remembered, That after the aforesaid cause proceeded to trial, and after all the evidence was heard, and after the Government and Defendant had rested their testimony, and while the jury was still at the bar, and before the Court had given his charge to them, and before the argument of counsel began, and without waiving the requested motion for instructed verdict, the defendant presented to the Court a written request that the Court give in his charge to the jury Special Charge No. Five, which, omitting caption and signatures, is as follows:

247 A reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time, and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant.

If from the evidence you believe the defendant killed the said James P. Hermes, but further believe that at the time of so doing the deceased had made an attack on him, which, from the manner and character of it and the relative strength of the parties and the defendant's knowledge of the character and disposition of the deceased, caused him to have a reasonable expectation of fear of death

or serious bodily injury and that acting under such reasonable expectation or fear, the defendant killed the deceased, then you should acquit him; and if the deceased was armed at the time he was killed and was making such attack on defendant, and if the weapon used by him and the manner of its use were such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the deceased intended to murder or to inflict serious bodily injury upon the defendant.

Refused Jan. 18th, 1918.

WM. B. SHEPPARD.

Indorsed: Defendant's Requested Charge No. 5. Filed 18 day of Jan'y, 1918.

Be it further remembered, That the Court, upon presentation of said special charge as aforesaid, refused to give the same to the jury, and did not include the same in his charge to the jury, and counsel for the defendant then and there in open Court excepted to the ruling of the Court, and saved his exception to the action of the Court, which exception was allowed.

248 And be it remembered that said charge and the request therefor was based upon the testimony of the following witnesses at the following places in the record, under the statement setting out the evidence heard at the trial of said cause, to-wit:

References omitted from printed record, being identical with those heretofore printed at page 231.

* * * * *

The Court's charge on the Indictment, and with reference to the alleged offense, is set out at page 232, hereof, under Bill of Exceptions No. XV.

Bill of Exceptions No. XVII.

Be it remembered, That after the aforesaid cause proceeded to trial, and after all the evidence was heard, and after the Government and Defendant had rested their testimony, and while the jury was still at the bar, and before the Court had given his charge to them, and before the argument of counsel began, and without waiving the requested motion for instructed verdict, the defendant presented to the Court a written request that the Court give in his charge to the jury special charge No. Six, which, omitting caption and signatures, is as follows:

Gentlemen of the Jury:

You are instructed that a deadly weapon is one which from the mode and manner of its use, is reasonably calculated or like to produce death, or inflict serious bodily injury.

Refused Jan. 18th, 1918.

WM. B. SHEPPARD.

Indorsed: Requested Charge No. 6. Filed 18 day of Jan'y, 1918.

249 Be it further remembered, That the Court, upon presentation of said Special Charge as aforesaid, refused to give the same to the jury, and did not include the same in his charge to the jury, and counsel for defendant then and there in open Court excepted to the ruling of the Court, and saved his exception to the action of the Court, which exception was allowed.

And be it remembered, That said charge and the request therefor was based upon the testimony of the following witnesses at the following places in the record, under the statement setting out the evidence heard at the trial of said cause, to-wit:

References omitted from printed record, being identical with those heretofore printed at page 231.

* * * * *

The Court's charge on the Indictment, and with reference to the alleged offense, is set out at page 232, hereof, under Bill of Exception No. XV.

Bill of Exceptions No. XVIII.

Be it remembered, That after the aforesaid cause proceeded to trial, and after all the evidence was heard, and after the Government and Defendant had rested their testimony, and while the Jury was still at the bar, and before the Court had given his charge to them, and before the argument of counsel began, and without waving the requested motion for instructed verdict, the defendant presented to the Court a written request that the Court give in his charge to the jury Special Charge No. Seven, which, omitting caption and signatures, is as follows:

Upon the law of self defense, you are instructed that if from the acts of the said James Hermes, or from his words coupled with his acts, there was created in the mind of the defendant a reasonable apprehension that he (the defendant) was in danger of losing
250 his life or of suffering serious bodily harm at the hands of said James Hermes, then the defendant had the right to defend himself from such danger or apparent danger, as it reasonably appeared to him at the time, viewed from his standpoint. And a party so unlawfully attacked is not bound to retreat in order to avoid

the necessity of killing his assailant. If you believe that the defendant committed the assault as a means of defense, believing at the time he did so (if he did so) that he was in danger of losing his life or of serious bodily injury at the hands of said James Hermes, then you will acquit the defendant.

Refused January 18, 1918.

WM. B. SHEPPARD,
Judge.

Indorsed: Defendant's Requested Charge No. 7. Filed 18 day of Jan'y, 1918.

Be it further remembered, That the Court, upon presentation of said Special Charge as aforesaid, refused to give the same to the jury, and did not include the same in his charge to the jury, and counsel for defendant then and there in open Court excepted to the ruling of the Court, and saved his exception to the action of the Court, which exception was allowed.

And be it remembered, That said charge and the request therefor was based upon the testimony of the following witnesses at the following places in the record, under the statement setting out the evidence heard at the trial of said cause, to-wit:

References omitted from printed record, being identical with those heretofore printed at page 231.

* * * * *

The Court's charge on the Indictment, and with reference to the alleged offense, is set out at page 232, hereof, under Bill of Exception No. XV.

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Bill of Exceptions No. XIX.

Be it remembered, That after the aforesaid cause proceeded to trial, and after all the evidence was heard, and after the Government and Defendant had rested their testimony, and while the jury was still at the bar, and before the Court had given his charge to them, and before the argument of counsel began, and without waiving the requested motion for instructed verdict, the defendant presented to the Court a written request that the Court give in his charge to the jury Special Charge No. Eight, which, omitting caption and signatures, is as follows:

If you believe from the evidence that previous to the homicide there had been communicated to defendant threats of the deceased to kill the defendant, or do him some serious bodily injury, and that at the time of the difficulty the acts and words or the acts coupled with the words of the deceased, were such as to create in the mind of the defendant, viewed alone from his standpoint, a reasonable apprehension or fear that the deceased was then and there about to carry such threats into execution, and to inflict upon him, defendant, death or

serious bodily injury, then you are instructed that defendant had the right to use such force as to him, viewed from his standpoint at the time, seemed reasonable and necessary to protect himself.

Refused January 18th, 1918.

WM. B. SHEPPARD,
Judge.

Indorsed:—Defendant's Requested Charge No. 8. Filed 18 days of Jan., 1918.

Be it further remembered, That the Court, upon presentation of said Special Charge as aforesaid, refused to give the same to the jury and did not include the same in his charge to the jury, and counsel for defendant then and there in open Court excepted to the ruling of the Court, and saved his exception to the action of the Court, which exception was allowed.

And be it remembered, That said charge and the request therefor was based upon the testimony of the following witnesses at the following places in the record, under the statement setting out the evidence heard at the trial of said cause, to wit:

References omitted from printed record, being identical with the heretofore printed at page 231.

* * * * *

The Court's charge on the Indictment, and with reference to the alleged offense, is set out at page 232, hereof, under Bill of Exception No. XV.

Bill of Exceptions No. XV.

Be it remembered, That after the aforesaid cause proceeded to trial and after all the evidence was heard, and after the Government and Defendant had rested their testimony, and while the jury was seated at the bar, and before the Court had given his charge to them, and before the argument of counsel began, and without waiving the requested motion for instructed verdict, the defendant presented to the Court a written request that the Court give in his charge to the jury Special Charge No. Nine, which, omitting caption and signatures as follows:

Gentlemen of the Jury:

The defendant was where he had a right to be when the difficulty arose, and if you believe from the evidence that the deceased advanced upon him in a threatening manner and with a deadly weapon and defendant at the time had reasonable grounds to believe, and good faith believed that the deceased intended to take his life, or him great bodily harm, he was not obliged to retreat, nor consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him.

in such way and with such force as under all the circumstances he, at the moment, believed and had reasonable grounds to believe was necessary to save his own life, or to protect himself from great bodily injury.

Refused January 18th, 1918.

WM. B. SHEPPARD,
Judge.

Indorsed:—Defendant's Requested Charge No. 9. Filed 18 day of Jan'y., 1918.

Be it further remembered, That the Court, upon presentation of said Special Charge as aforesaid, refused to give the same to the jury, and did not include the same in his charge to the jury, and counsel for defendant then and there in open Court excepted to the ruling of the Court, and saved his exception to the action of the Court, which exception was allowed.

And be it remembered, That said charge and the request therefor was based upon the testimony of the following witnesses at the following places in the record, under the statement setting out the evidence heard at the trial of said cause, to wit:

References omitted from printed record, being identical with those heretofore printed at page 231.

* * * * *

The Court's charge on the Indictment, and with reference to the alleged offense, is set out at page 232, hereof, under Bill of Exception No. XV.

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Bill of Exceptions XXI.

Be it remembered, That after the aforesaid cause proceeded to trial, and after all the evidence was heard, and after the Government and Defendant had rested their testimony, and while the jury was still at the bar, and before the Court had given his charge to them, and before the argument of counsel began, and without waiving the requested motion for instructed verdict, the defendant presented to the Court a written request that the Court give in his charge to the jury Special Charge No. Ten, which, omitting caption and signatures, is as follows:

Gentlemen of the Jury:

The defendant had the same right to act upon the reasonable appearance of danger as upon real danger, and if you should believe from the evidence that the defendant was not in fact in real danger of death or serious bodily injury at the hands of the deceased at the time he killed deceased, but that the defendant reasonably believed he was in danger, and acting upon such belief killed deceased, you should acquit him.

And you are instructed that if you believe from the evidence that at the time of the killing it reasonably appeared to defendant from his standpoint at the time from the acts of the deceased, that deceased was then and there about to inflict upon him, the defendant, death or serious bodily injury, whether such was the purpose of the deceased or not, and that there was thereby created in the mind of the defendant a reasonable expectation or fear of death or serious bodily injury, then defendant had the right to kill the deceased, and was not required to resort to any other means to repel said attack, nor to retreat in order to avoid the necessity of killing the deceased, and was authorized so to act, whether such danger was real or not, provided it appeared to him, the defendant, to be real, viewed alone from his standpoint at the time.

Refused January 18th, 1918.

WM. B. SHEPPARD,
Judge.

255 Indorsed:—Defendant's Requested Charge No. 10. Filed 18 day of Jan., 1918.

Be it further remembered, That the Court, upon presentation of said Special Charge as aforesaid, refused to give the same to the jury, and did not include the same in his charge to the jury, and counsel for defendant then and there in open Court excepted to the ruling of the Court, and saved his exception to the action of the Court, which exception was allowed.

And be it remembered, That said charge and the request therefor was based upon the testimony of the following witnesses at the following places in the record, under the statement setting out the evidence heard at the trial of said cause, to wit:

References omitted from printed record, being identical with those heretofore printed at page 231.

* * * * *

The Court's charge on the Indictment, and with reference to the alleged offense, is set out at page 232, hereof, under Bill of Exception No. XV.

Bill of Exception No. XXII.

Be it remembered, That after the aforesaid cause proceeded to trial and after all the evidence was heard, and after the Government and Defendant had rested their testimony, and while the jury was still at the bar, and before the Court had given his charge to them, and before the argument of counsel began, and without waiving the requested motion for instructed verdict, the defendant presented to the Court a written request that the Court give in his charge to the jury Special Charge No. Twelve, which, omitting caption and signatures, is as follows:

56 Gentlemen of the Jury:

You are instructed that if you believe from the evidence that at the time of the homicide it reasonably appeared to defendant, judged from his standpoint, that the deceased was armed with a knife, and defendant further believed that he, the deceased, from the mode and manner of its use, was about to inflict on defendant therewith death or some serious bodily injury, then you are instructed that under such circumstances the defendant would be justified in resisting such assault with force, even to the extent of killing the deceased.

Refused January 18th, 1918.

WM. B. SHEPPARD,

Judge.

Indorsed:—Defendant's Requested Charge No. 12. Filed 18 day Jan'y., 1918.

Be it further remembered, That the Court, upon presentation of said Special Charge as aforesaid, refused to give the same to the jury, and did not include the same in his charge to the jury, and counsel for defendant then and there in open Court excepted to the ruling of the Court, and saved his exception to the action of the Court, which exception was allowed.

And be it remembered, That said charge and the request therefor is based upon the testimony of the following witnesses at the following places in the record, under the statement setting out the evidence read at the trial of said cause, to wit:

References omitted from printed record, being identical with those heretofore printed at page 231.

* * * * *

The Court's charge on the Indictment, and with reference to the alleged offense, is set out at page 232, hereof, under Bill of Exceptions No. XV.

Bill of Exceptions No. XXIII,

Be it remembered, That after the aforesaid cause proceeded to trial, and after all the evidence was heard, and after the Government and defendant had rested their testimony, and while the jury was still at the bar, and before the Court had given his charge to them, and before the argument of counsel began, and without waiving the rested motion for instructed verdict, the defendant presented to the Court a written request that the Court give in his charge to the jury Special Charge No. 13, which, omitting caption and signatures, is as follows:

Gentlemen of the Jury:

You are instructed that if you believe from the evidence that the fourth shot was fired accidentally, or if you have a reasonable doubt thereof, then you are instructed that the fact that said fourth shot may have been fired, and a wound thereby inflicted, should not be further considered by you in passing upon the issues submitted to you herein.

Refused January 18th, 1918.

WM. B. SHEPPARD,
Judge.

Indorsed: Defendant's Requested Charge No. 13. Filed 18 day of Jan'y, 1918.

Be it further remembered, That the Court, upon presentation of said Special Charge as aforesaid, refused to give the same to the jury, and did not include the same in his charge to the jury, and counsel for defendant then and there in open Court excepted to the ruling of the Court, and saved his exception to the action of the Court, which exception was allowed.

And be it remembered, That said charge and the request therefor was based upon the testimony of the following witnesses at the following places in the record, under the statement setting out the evidence heard at the trial of said cause, to-wit:

258 References omitted from printed record, being identical with those heretofore printed at page 231.

* * * * * * *

The Court's charge on the Indictment, and with reference to the alleged offense, is set out at page 232, heretofore, under Bill of Exceptions No. XV.

Bill of Exceptions No. XXII.

Be it remembered, That after the aforesaid cause proceeded to trial, and after all the evidence was heard, and after the Government and Defendant had rested their testimony, and while the jury was still at the bar, and before the Court had given his charge to them, and before the argument of counsel began, and without waiving the requested motion for instructed verdict, the defendant presented to the Court a written request that the Court give in his charge to the jury Special Charge No. 14, which, omitting caption and signatures, is as follows:

Gentlemen of the Jury:

In this case there is evidence that the shot that killed the deceased was the third shot fired by the defendant.

If you believe from the evidence that such was the case, or if you have a reasonable doubt as to whether he was killed by the third shot, or by the fourth shot, and you should further believe that the fourth shot was fired with malice aforethought, express or implied, but you have a reasonable doubt as to whether the third shot was fired under such circumstances that if death had resulted therefrom it would have been murder, you are, in such event, instructed that you cannot find the defendant guilty of any higher grade of offense than assault with intent to murder, for the results of such fourth shot.

Refused January 18th, 1918.

WM. B. SHEPPARD,
Judge.

259 Indorsed: Special Charge No. 14. Filed 18 day of Jan'y, 1918.

Be it further remembered, That the Court, upon presentation of said Special Charge as aforesaid, refused to give the same to the jury, and did not include the same in his charge to the jury, and counsel for defendant then and there in open Court excepted to the ruling of the Court, and saved his exception to the action of the Court, which exception was allowed.

And be it remembered, That said charge and the request therefor was based upon the testimony of the following witnesses at the following places in the record, under the statement setting out the evidence heard at the trial of said cause, to-wit:

References omitted from printed record, being identical with those heretofore printed at page 231.

* * * * *

The Court's charge on the Indictment, and with reference to the alleged offense, is set out at page 232, hereof, under Bill of Exceptions No. XV.

Bill of Exceptions No. XVI.

Be it remembered, That after the aforesaid cause proceeded to trial, and after all the evidence was heard, and after the Government and defendant had rested their testimony, and while the jury was still at the bar, and before the Court had given his charge to them, and before the argument of counsel began, and without waiving the requested motion for instructed verdict, the defendant presented to the Court a written request that the Court give in his charge to the jury Special Charge No. Fifteen, which, omitting caption and signatures, is as follows:

260 You are instructed that it has not been shown that the United States ever acquired title to the parcel of land where the homicide occurred, or that the cession was for one of the express

purposes authorizing cession, and you must therefore acquit the defendant.

Refused January 18th, 1918.

WM. B. SHEPPARD,
Judge.

Indorsed: Special Charge No. 15. Filed 18 day of Jan'y, 1918.

Be it further remembered, That the Court, upon presentation of said Special Charge as aforesaid, refused to give the same to the jury, and did not include the same in his charge to the jury, and counsel for defendant then and there in open Court excepted to the ruling of the Court, and saved his exception to the action of the Court, which exception was allowed.

And be it remembered, That said charge and the request therefor was based upon the testimony of the following witnesses at the following places in the record, under the statement setting out the evidence heard at the trial of said cause, to-wit:

References omitted from printed record, being identical with those heretofore printed at page 231.

* * * * *

The Court's charge on the Indictment, and with reference to the alleged offense, is set out at page 232, hereof, under Bill of Exceptions No. XV.

261

Bill of Exceptions No. XXVI.

Be it remembered, That after the aforesaid cause proceeded to trial, and after all the evidence was heard, and after the Government and Defendant had rested their testimony, and while the jury was still at the bar, and before the Court had given his charge to them, and before the argument of counsel began, and without waiving the requested motion for instructed verdict, the defendant presented to the Court a written request that the Court give in his charge to the jury Special Charge No. 16, which, omitting caption and signatures, is as follows:

You are instructed that it has not been shown that the United States ever acquired title to the parcel of land where the homicide occurred, and you must therefore acquit the defendant.

Refused January 18th, 1918.

WM. B. SHEPPARD,
Judge.

Indorsed: Special Charge No. 16. Filed 18 day of Jan'y, 1918.

Be it further remembered, That the Court, upon presentation of said Special Charge as aforesaid, refused to give the same to the jury,

and did not include the same in his charge to the jury, and counsel for defendant then and there in open Court excepted to the ruling of the Court, and saved his exception to the action of the Court, which exception was allowed.

And be it remembered, That said charge and the request therefor was based upon the testimony of the following witnesses at the following places in the record, under the statement setting out the evidence heard at the trial of said cause, to-wit:

References omitted from printed record, being identical with those heretofore printed at page 231.

* * * * *

262 The Court's charge on the Indictment, and with reference to the alleged offense, is set out at page 232, hereof, under Bill of Exceptions No. XV.

Bill of Exceptions No. XXVII.

Be it remembered, That after all the evidence had been introduced in said cause, and after the jury had returned its verdict, but before sentence passed in this cause, the defendant, Robert B. Brown, on the 19th day of January, A. D. 1918, filed his written motion in arrest of judgment, and presented the same to the Court for his action in open Court, before the term ended at which said trial was had, and before sentence passed upon him; said motion in Arrest of Judgment being as follows:

In the United States District Court for the Southern District of Texas,
Corpus Christi Division, January Term, A. D. 1918.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

To the Hon. Wm. B. Sheppard, Judge of said Court:

And now after verdict against the said defendant, and before sentence, comes the said defendant, Robert B. Brown, in his own proper person, and by his attorneys, James R. Dougherty, Gordon Boone, H. S. Bonham, and James F. Odem, and moves the Court here to arrest judgment against him herein and not pronounce the same for the following reasons, to-wit:

1.

263 Because the Court erred in overruling defendant's plea in abatement and motion to require the Court to take no further action in the case at Corpus Christi, in Nueces County, Texas,

because it appears therefrom that jurisdiction over this case had attached in Bee County.

2.

Because the case was a capital one, punishable by death, and should have been tried in the County of Bee, and not in Nueces County, as requested by defendant.

3.

Because the indictment, on its face, charges this defendant with no offense against the laws of the United States and it appears therefrom that this Court is without jurisdiction to try this cause in this:

(a) That it does not appear from said indictment that sovereignty and jurisdiction over the tract of land have been ceded by the Governor of Texas for one of the specific purposes, to-wit, in this case, a post-office site, for which under the laws of the United States, or the State of Texas, jurisdiction might be ceded.

(b) Because there was no evidence to show that the United States ever acquired title to said property before the cession of jurisdiction thereof.

(c) Because it was not shown that the tract of land where said homicide occurred was in the county of Bee, or Southern District of Texas.

(d) Because such cession, if any, seems to have been made by the Governor of the State, when, under the Constitution and laws of the state, the function of transfer of sovereignty could be exercised only by the Legislature of the State, and could not be delegated by the Legislature to the Governor.

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4.

For further grounds for this motion in arrest of judgment, this defendant says that said indictment charges this defendant with no offense against the laws of the United States, and is wholly insufficient in its allegations to charge this defendant with any violation of any penal laws of the United States within the territorial jurisdiction of the United States.

Wherefore, he prays that this Court should arrest said judgment, as before prayed, and no sentence or judgment should be entered against him.

5.

And for further reasons and grounds for this motion, this defendant says that there was no evidence introduced on the trial of this cause, showing that defendant was guilty of murder in the territorial

jurisdiction of the United States, and if there was such evidence it was wholly at variance with the indictment, which did not so charge.

Wherefore, this defendant moves the Court that judgment be arrested, and that he be discharged, or that such other proper order be entered as may be necessary for his protection in the premises.

DOUGHERTY & DOUGHERTY,
G. R. SCOTT,
BOONE & POPE,
H. S. BONHAM &
J. F. ODEM,

Att'ys for R. B. Brown, Def't.

Indorsed:—Defendant's Motion in Arrest of Judgment. Filed 19 day of Jany., 1918.

Thereupon the Court considered said motion, heard the argument of counsel thereon, and considered in connection therewith all the evidence, which had been introduced in said cause, as set forth and shown in the statement of all the evidence under Bill No. XI of the Bill of Exceptions at pages 100 to 266 hereof, to which reference is hereby made. And upon consideration of said Motion in Arrest of Judgment, the Court then and there, on the 19th day of January, A. D. 1918, in open Court, overruled the same, and proceeded to pass sentence upon the defendant, Robert B. Brown, as shown by the sentence and judgment of the Court in the record of this cause, and to this action of the Court in overruling the Motion in Arrest of Judgment, the defendant, Robert B. Brown, then and there, in open Court, excepted, before sentence pronounced, which exception was allowed by the Court.

To the action of the Court, in overruling said exceptions, the defendant then and there in open Court excepted, which exception was allowed by the Court.

G. R. SCOTT,
BOONE & POPE,
DOUGHERTY & DOUGHERTY,
H. S. BONHAM AND
JAS F. ODEM,

Att'ys for Defendant.

This is to certify that the defendant, Robert B. Brown, in the above styled and numbered cause, made and on the 18th day of March, A. D. 1918, presented the foregoing bill of Exceptions for approval and allowance; and by agreement of counsel for the Government and for the defendant, each and every part stated in each of the foregoing bills of Exceptions herein shall be considered as a part of each and every bill of exception herein, and said agreement is so ordered and approved; and I here and now settle and have settled the foregoing as the bill of exceptions in this case presenting for review each and all the matters herein contained.

And the foregoing as such bill of exceptions is now adjudged, decreed and ordered to be the bill of exceptions herein, and as
 266 such the same is here and now settled and allowed and approved by me and make a part of the record herein, and the Clerk of the Court is directed to file the same in the records in this cause as the Bill of Exceptions herein.

And the foregoing bill of exceptions is here and now signed and settled this 18th day of March, A. D. 1918.

WM. B. SHEPPARD,

*United States District Judge of
 the Southern District of Texas.*

Judge Wm. B. Sheppard:

I have gone over the foregoing bill of exceptions with attorneys for defendants, and O. K. Same. This 18th day of March, A. D. 1918.

JNO. E. GREEN, Jr.,

U. S. Att'y.

Indorsements:—Defendant's Bill of Exceptions and Order Allowing and Approving Same. Filed 18th day of March, A. D. 1918.

Judgment and Sentence of the Defendant.

Entered January 19th, 1918.

In the District Court of the United States for the Southern District of Texas.

Be it Remembered, that at a Regular Term of the District Court of the United States for the Southern District of Texas, begun and held in and for the District aforesaid, at the Court-rooms of said Court in the City of Corpus Christi on Saturday the 19th day of January, A. D. 1918:

267 Present and presiding, the Honorable Wm. B. Sheppard, Judge of the District Court of the United States for the Southern District of Texas, when the following among other proceedings, were had, to-wit:

District Court.

No. 82, Criminal Docket.

THE UNITED STATES

VS.

ROBERT B. BROWN.

January 19th, 1918.

On motion of Jno. E. Green, Jr. Esq., Attorney of the United States for the Southern District of Texas, the above named Defend-

nt, Robert B. Brown, was this day brought to the bar of the Court in custody of the Marshal of said District, and being asked by the Court if he had anything to say why the judgment and sentence of the Court should not be pronounced upon him in accordance with the verdict of the jury rendered in this cause on 19th day of January, 1918, and the law in such cases made and provided, and no good cause being shown why the judgment and sentence of the Court should not be pronounced herein:

It is therefore considered by the Court that the defendant is guilty of murder in the second degree as charged in the Indictment and as found by the jury, and his punishment is fixed and assessed as follows, to-wit: That he be imprisoned in the U. S. Penitentiary situated at Atlanta in the Northern District of Georgia for the term and period of Fifteen (15) years.

It is therefore ordered, adjudged and decreed by the Court that the defendant be imprisoned at hard labor for the period and at the place so fixed and assessed as aforesaid; for which let execution issue.

It is further ordered by the Court that the Defendant be remanded to the custody of the Marshal and be by him committed to the jail of Nueces County forthwith, and as soon as practicable that he be by the Marshal conveyed to the U. S. Penitentiary designated above, and there be delivered to the custody of the keeper of said penitentiary who will receive and safely keep the said Robert Brown imprisoned in said penitentiary in execution of the sentence aforesaid and in conformity with the same, for the full period of the time aforesaid. And it is further ordered that the Clerk of this Court issue a Mittimus to the Marshal of this District commanding the due execution of this decree. And it is further ordered that the Clerk of this Court furnish the Marshal aforesaid with a duly certified copy—under seal—of this judgment, sentence and order, which shall be delivered to the keeper of said penitentiary.

To the entry of the foregoing Judgment, the defendant, Robert Brown, in open Court duly excepted, and gave notice of appeal to the United States Circuit Court of Appeals, in and for the Fifth Circuit.

It is further ordered that the Clerk of this Court issue a Mittimus to Nueces County Jail, pending appeal.

Petition for Writ of Error.

Filed March 9th, 1918.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

269 Robert B. Brown, defendant in the above numbered and styled cause, feeling himself aggrieved by the Verdict of the jury on January 19th, 1918, and judgment thereon and sentence therein on the 19th day of January, A. D. 1918, and in the records and proceedings had in said cause, comes now by James R. Dougherty, Dougherty and Dougherty, H. S. Bonham, G. R. Scott, Boone and Pope, and James F. Odem, his attorneys, and petitions this Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, according to the laws of the United States in that behalf provided, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and also that an order be made fixing the amount of security which the defendant shall give and furnish under said writ of error; and that upon the giving of such writ of error bond security, all further proceedings under this cause be suspended and stayed until the termination of such writ of error to the United States Circuit Court of Appeals for the Fifth Circuit.

JAMES R. DOUGHERTY,
DOUGHERTY & DOUGHERTY,
G. R. SCOTT,
BOONE & POPE,
H. S. BONHAM,
JAMES F. ODEM,

Attorneys for Defendant, Robert B. Brown.

Indorsed: Petition for Writ of Error. Filed 9 day of Mch., 1918.

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Assignment of Error.

Filed March 9th, 1918.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS. •

ROBERT B. BROWN.

Comes now the defendant, Robert B. Brown, and assigns the following errors as committed by the Court in the trial of the above styled and numbered cause:

First Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in overruling the plea in abatement filed in this cause.

Second Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in overruling defendant's motion, requiring the trial of this cause to be held in the county of Bee, where the offense, a capital one, was alleged to have been committed.

Third Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in overruling the defendant's motion to quash the indictment, because said indictment charges this defendant with no offense against the laws of the United States.

Fourth Assignment of Error.

271 The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in overruling defendant's motion to quash the indictment, because it does not appear from said indictment that the United States had acquired the title to said tract of land on which the offense was alleged to have been committed, for any one of the express purposes for which the cession of exclusive jurisdiction is permitted by the Constitution of

the United States, or the statutes of the state of Texas, or the United States.

Fifth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in overruling the motion to quash the indictment, it failing to declare that the crime or offense was committed within or on a place purchased or otherwise acquired by the United States by consent of the Legislature of the State of Texas for the erection of a fort, magazine, arsenal, dockyards, or other needful buildings, to wit, in this instance, a post office building; the offense, therefore, as charged in the indictment, was not within the jurisdiction of the United States, and particularly it was not within the territorial jurisdiction of the United States as prescribed by Criminal Code, Article 272.

Sixth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in overruling the motion to quash the indictment, because said indictment did not show that the instrument of cession of jurisdiction was made for one of the express purposes, to wit, a post office site, for which cession is permitted by laws of this state, or the Constitution of the United States, but alleges that it was acquired for some general public purposes of the United States, and therefore beyond the power of the Governor of the State of Texas to execute.

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Seventh Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in overruling the motion to quash the indictment, because it appears that the cession was made by the Governor of the State of Texas, and not by the Legislature of the State of Texas, and, therefore, null and void, as by the terms and provisions of the Constitution of the State of Texas, the Governor could not execute a deed of cession,—this function being purely legislative.

Eighth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in permitting the introduction of the certified copy of deed from Ed. Swanton and Caroline Swanton to the United States of America, and the certified copy of deed from A. Praeger and wife, Lizzie Praeger, to the United States of America, purporting to convey to the United States of America the tract of land on which the offense was alleged to have been committed, over the objection of the defendant, because it was not shown that the original instruments had been lost, or could not be procured and there was no proof of the execution of the original instruments.

and said certified copies had not been filed in the papers of the case for the period of three days, as required by statute, nor was any affidavit of the loss or inability to procure the originals of said instruments made by the party tendering the deeds, nor was any notice served upon the defendant, as required by Article 3700 R. S. of Texas; said certified copies of deeds from Ed. Swanton and Caroline Swanton to the United States of America and from A. Praeger and Lizzie Praeger to the United States of America are set out in full under Bill of Exceptions No. IV, page 80, supra.

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Ninth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in permitting the Government to introduce in evidence two instruments, purporting to be original deeds, one from Ed. Swanton and Caroline Swanton to the United States and one from A. Praeger and Lizzie Praeger to the United States, and purporting to convey the tract of land described in said certified copies above mentioned, purporting to be the originals of the certified copies mentioned in the foregoing assignment of error No. 8, over the objection of the defendant, that the execution of said instruments had not been proven, that no notice of purpose to use them in evidence had been given to the defendant; that they had not been filed in the papers of the case, as required by statute to make them, admissible as evidence without proof of execution, and no notice had been given of the purpose or intent upon the part of the United States to introduce them in evidence in said cause.

Tenth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in permitting the Government to introduce in evidence Instrument marked Exhibit 7, purporting to be a deed of cession of jurisdiction of the tract or parcel of land on which the offense was alleged to have been committed, over the objection of the defendant, because there was no evidence that the United States had theretofore acquired the lands therein described for any of the specific purposes for which our statutes warrant cession of jurisdiction.

Eleventh Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in admitting in evidence said instrument purporting to cede jurisdiction over the land in question, because it did not appear that the United States had acquired title to said land by purchasing or otherwise, and in the absence of this showing it was not within the power of the Governor to cede, nor of the United States to acquire jurisdiction over the tract of land in controversy.

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Twelfth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in admitting said instrument of cession in evidence in this cause, over the objection of the defendant, for the reason that there is no declaration therein that the United States had acquired the property for any one of the specific purposes for which the transfer of sovereignty and exclusive jurisdiction is permitted by the laws of the state of Texas, or the Constitution and laws of the United States, but on the contrary, it appears that said property was acquired for the general public purposes of the United States, and, therefore, beyond the power of the Governor of the State of Texas to transfer the jurisdiction of said property to the United States.

Thirteenth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in admitting said instrument of cession in evidence over the objection of defendant, because such transfer of jurisdiction was made and executed by the Governor of the State of Texas, and not by the Legislature, and transfer of such jurisdiction by the State of Texas was purely and exclusively a legislative function to be executed by the Legislature and could not be delegated to the Governor under the terms of the Constitution of the State of Texas.

Fourteenth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in admitting in evidence over the objection of the defendant the photographic copy of the instrument of cession.

Fifteenth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in admitting the certificate annexed to the photographic copy of the deed of cession in evidence over the objection of the defendant, because, insofar as it certifies that the deed cedes jurisdiction over the land acquired as a Federal building site, that this is heresay, a conclusion of the Secretary certifying, as there is no evidence in the record or instrument of cession to show that the property was acquired for such purpose, acquired at all.

Sixteenth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in refusing to strike out

no certified copies of deed, one from Ed. Swanton and Caroline Swanton to the United States of America, and the other from A. Praeger and Lizzie Praeger to the United States, and also the two originals thereof from the same persons to the United States of America, after it was shown by the testimony of L. C. Masterson, Clerk of this Court, that said instruments had not been filed in the papers of this cause, no notice had ever been issued to the defendant or the plaintiff that the United States expected to use them, no affidavit of legs or inability to procure the originals had been filed, and being shown that the papers had been filed generally in Court on the day before the return of the indictment in this cause, but had never been filed in the papers of this case, and no notice thereof had ever been issued to the defendant, no proof having been made of their execution.

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Seventeenth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in refusing to permit the witness, Joe Thornton, Sheriff of Bee County, Texas, to testify that he knew that the defendant, Robert B. Brown, had abandoned his personal attendance upon his transfer business for the purpose of avoiding and having no further difficulty with the deceased on the objection of the Government, that such testimony was irrelevant and immaterial.

Eighteenth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in refusing to permit the defendant, Robert B. Brown, while testifying in his own behalf, to testify that Mr. Hare, the Government contractor in charge of the construction of the post office building, had instructed him that he did not want the black dirt taken away from the excavation to be hauled away, as this testimony was material in connection with the further testimony of the defendant that he told Sol Miller, engaged in driving a wagon of the deceased and in hauling dirt away from the premises that such instruction had been given.

Nineteenth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in not granting the motion for instructed verdict made by the defendant, Robert B. Brown, which motion, caption and signatures omitted, is as follows:

To the Hon. Wm. R. Sheppard, Judge of said Court:

"Now comes the defendant, Robert B. Brown, and moves the Court to instruct the jury in the above cause to return a verdict of not guilty in favor of this defendant on the charge made herein against him, because the evidence introduced in said

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cause is wholly insufficient to show any violation by him of any of the laws of the United States charged to have been violated by him, and there is no evidence that he was guilty of any offense against the laws of the United States, charged in this cause."

Twentieth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in permitting the Government to ask the witness, Dr. J. H. Lander, over the objection of the defendant, the following question:

"Q. From your examination of these four bullet wounds and this contusion on the ear; if the testimony showed that when the first shot was fired Hermis was standing, the second shot he was standing, partially leaning forward; the third shot that he reeled, or rather in a twisted fashion, turned and fell, with his back in the general direction of Brown who was firing the shots, and that as he fell on his back he supported himself on one or both arms, and appeared to be trying to get up, and talking to Brown, and then there was a fourth shot fired, and he immediately relaxed, and went back flat on the ground; which shot would you say was it, the first, second, third or fourth, that severed the thoracic aorta?"

Because the question invaded the province of the jury, calling for an opinion on a question of the time and order in which the bullets were fired, which is not a proper question for expert testimony, but the matter is to be determined by the jury from all the facts and circumstances of the case, and that it was for the jury to determine from the courses, etc., of the various bullets how the shots were fired.

To which question the witness answered:

278 "A. In my opinion, under these conditions, it would be the last shot that was fired that severed the aorta."

Twenty-first Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in permitting the same witness, Dr. J. H. Lander, over the objection of the defendant, to be asked the following question:

"Q. Now the one that you describe as "d" is the one to which I am directing your attention; the one that severed the aortic [thoracic] aorta? Would it be possible for that wound to have been received if the deceased was lying on the ground, raised on his elbow, his right elbow or arm, and slightly twisted towards the defendant who was standing on his right side; and twisting and attempting to raise himself?"

The objection by defendant being the same as the objection urged in the Twentieth Assignment of Error.

Twenty-second Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in failing and refusing to give in charge to the jury Defendant's Special Charge No. Four, which, caption and signatures omitted, is as follows:

Gentlemen of the Jury:

"You are instructed that in considering the guilt or innocence of the defendant, you should view the facts and circumstances of the case as nearly as you can from the standpoint of the defendant, and put yourself, as nearly as you can, in his place, and see and consider the situation as in your judgment it may at the time have appeared to him, and if, upon so doing you cannot say from all the evidences before you that you are convinced beyond a reasonable doubt of the guilt of the defendant, then you should find him not guilty."

Twenty-third Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in its main charge to the jury in the fifth paragraph thereof, wherein it defined murder in the second degree, because the definition therein submitted to the jury, "as the unlawful killing of a human being when perpetrated by an act imminently dangerous to the life of another," is erroneous.

Twenty-fourth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in submitting Paragraph 5-A of its main charge to the jury, wherein it charged the jury: "If you find from the evidence that the fourth shot was fired accidentally, or if you have a reasonable doubt as to whether it was fired accidentally, and a wound thereby inflicted, then you are instructed that said fourth shot cannot be further considered by you in determining the guilt or innocence of the accused."

Twenty-fourth-A Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in submitting to the jury paragraph Eleven of its main charge, which is as follows, to-wit:

"11. If you believe from the evidence that the defendant, shot and killed James P. Hermes, at a time when the said James P. Hermes was making an assault upon the defendant, with a dangerous or deadly weapon, that is, with a weapon capable of inflicting

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death or great bodily harm, and under such circumstances as to put a reasonable man in the position of the defendant in fear of his life, or great bodily harm; and such circumstances would appear to a reasonable mind, as making retreat or attempted retreat dangerous to his personal safety; and the defendant would be justified in standing his ground, and resisting the attack with all necessary force, even to the taking of the life of his assailant; and in such case you would find the defendant not guilty."

Twenty-fourth-B Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in submitting Paragraph Twelfth of its main charge to the jury, which is as follows:

"12. But, unless the assault was made by the deceased upon the defendant with a dangerous or deadly weapon, and under circumstances which would put a reasonably prudent man in fear of his life or great bodily harm, there would be no justification for taking the life of James P. Hermes, and if you find from the evidence that James P. Hermes was about to assault the defendant, without a dangerous or deadly weapon, and the defendant shot and killed James P. Hermes with a premeditated design to effect his death, then such killing would amount to murder, and the instructions as to this crime previously given would apply."

Because it denied Deft. the right to act on the appearance of danger of death or serious bodily injury.

Twenty-fourth-C Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in submitting Paragraph 13-B of its main charge to the jury, which is as follows:

281 "If, however, you believe from the evidence, that at the time of the killing it would have appeared to a reasonably prudent man, situated as the defendant was, and in the circumstances of the defendant, that the defendant was armed with a deadly or dangerous weapon, and the defendant had reasonable ground to believe that the deceased, from the mode and manner of the use of such weapon was about to inflict on defendant, or that there was apparent danger of his inflicting upon defendant death or some serious bodily injury and retreat was apparently dangerous, then you are instructed that under such circumstances the defendant would be justified in resisting the assault with all necessary force, even to the extent of killing the assailant."

Twenty-fifth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in submitting Paragraph 13-C of its main charge to the jury, which is as follows:

"If you believe from the evidence, that previous to the homicide there had been communicated to defendant threats of the deceased, to kill defendant or do him some serious bodily harm, and that at the time of the difficulty the acts and words of the deceased, accompanied with demonstrations evincing a purpose to put into effect such threats in such a manner as to create in the mind of a reasonable man a reasonable apprehension or fear that the deceased was then and there about to carry such threats into execution and to inflict upon defendant death or serious bodily harm, then you are instructed that the defendant had the right to use such force as would be reasonably necessary to protect himself, provided that he was unable to retreat and avoid the conflict, or that an attempt to do so would have appeared dangerous to a reasonable man under the circumstances of the attack.

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Twenty-sixth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in the Eleventh paragraph of its main charge to the jury, in that it imposed the duty upon the defendant to retreat, before he would have the right to kill the deceased in his necessary self defense, unless retreat was dangerous to his personal safety.

Twenty-seventh Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in the Twelfth paragraph of its main charge to the jury, wherein it charged the jury, "If you find from the evidence that James P. Hermis was about to assault the defendant, without a dangerous or deadly weapon, and the defendant shot and killed James P. Hermis with a premeditated design to effect his death, then such killing would amount to murder, and the instructions as to this crime previously given would apply." Because the charge denied the defect, the right to act on the appearance of danger.

Twenty-eighth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in submitting the Twelfth paragraph of its main charge to the jury, because said charge ignores the issue of apparent danger.

Twenty-ninth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in submitting Paragraph 13-B of its main charge to the jury, because it limits the right of defendant's self defense, and requires him to retreat, although assaulted at a place where he had a right to be.

Thirtieth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in submitting Paragraph 13-C of its main charge to the jury, because it again limits the right of self defense unlawfully, and imposes the necessity upon the defendant to retreat and avoid the conflict though he was being subjected to an assault, which, viewed from the standpoint of the defendant, created in his mind a reasonable apprehension or fear that the deceased was about to inflict upon him death or serious bodily injury.

Thirty-first Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in submitting Paragraph Fourteen of its main charge to the jury; said paragraph being as follows, to-wit:

"14. If you believe from the evidence that at the time of the homicide the deceased made an assault upon the defendant with a deadly weapon, and defendant's knowledge of the character and disposition of the deceased would have caused a reasonable man in the situation of the defendant to have entertained fear of death or serious bodily injury, when retreat or any attempt to retreat would have appeared dangerous to a reasonable man, and that, acting under such reasonable fear, the defendant killed the deceased in repelling the assault then you should find the defendant not guilty."

Thirty-second Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in submitting Paragraph Fifteen of its main charge to the jury, said paragraph of said main charge being as follows:

284 "15. If the deceased was armed at the time of such assault, and was making an attack on defendant, with a deadly weapon, as would put a reasonable man in fear of death or serious bodily harm; then the defendant would be justified in believing that the deceased intended to kill or inflict serious bodily harm upon him, and if retreat would have appeared to a man of reasonable prudence, in the position of the defendant, as involving danger or death or serious bodily harm, then the defendant was entitled to stand his ground, and repel force with force, even to the extent of taking the life of his assailant."

Thirty-third Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in its main charge, in giv-

ing undue prominence to the necessity of retreat upon the part of the defendant before he could exercise his right of self defense; this being emphasized in Paragraphs 10, 11, 13-B, 13-C, 14 and 15 of the main charge.

Thirty-fourth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in that portion of its main charge as follows:

"This Court could not entertain jurisdiction of the offense against the defendant, unless it was alleged and proved to have been committed on the lot, tract or parcel of land, exclusive jurisdiction over which had been so ceded to the United States, "because said charge does not limit the jurisdiction of the United States to a lot or parcel of land over which exclusive jurisdiction had been ceded for one of the specific purposes for which cession is permitted by the Revised Statutes of the State of Texas and the Constitution of the United States. And because it did not require the jury to find that the property had been acquired by the United States of America for such purpose.

285 Thirty-fifth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in that portion of its main charge as follows:

"I, therefore charge you as a matter of law, that the instrument executed by the Governor of the State of Texas, which has been produced in evidence in this trial, cedes to the United States exclusive jurisdiction over the land and territory contained within the boundaries of the lot, tract, or parcel of land, described in the indictment," because,

(a) It was not shown that the United States ever acquired title to the tract in controversy, and,

(b) Because the instrument of cession did not appear to have been made for one of the express purposes, to-wit, a post office, for which cession of jurisdiction was permitted by the laws of this state, or the Constitution of the United States, and therefore, beyond the power of the Governor to cede, and,

(c) Because it appears that the cession was by the Governor, and not by the Legislature of the State of Texas.

Thirty-sixth Assignment of Error

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in submitting that portion of its main charge to the jury, "I therefore charge you as a matter of law, that the instrument executed by the Governor of the State

of Texas, which has been produced in evidence in this trial, cedes to the United States exclusive jurisdiction over the land and territory contained within the boundaries of the lot, tract, or parcel of land, described in the indictment," because this was an invasion of the province of the jury, and did not require them to find as a fact that the property had been acquired by the United States for one of the specific purposes, which would warrant the cession of sovereignty and jurisdiction to it, and further invaded the province of the jury, in that it advised them that the effect of the instrument was to cede to the United States exclusive jurisdiction over the land described in the indictment, which was at best an issue of fact to be found by the jury.

Thirty-seventh Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in submitting said paragraph above quoted in Assignment of Error No. Thirty-six, to the jury, because it appears that the cession was by the Governor, and not by the Legislature of the State, which alone had the power to make such cession, and, therefore, the purported cession of jurisdiction to the United States was void.

Thirty-eighth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred because it did not submit the offense of assault with intent to murder to the jury.

Thirty-ninth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred, in failing to submit in its main charge to the jury the issue as to the difference in the culpability of the defendant according as death resulted from the third or fourth shots.

Fortieth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in failing to submit to the jury the issue as to whether the fourth shot was or not the fatal wound, and the degree of culpability that would attach to defendant, if the third shot was the one that caused the death of the deceased.

Forty-first Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in failing to charge upon the previous assaults made upon the defendant by the deceased.

Forty-second Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in its main charge, in paragraph Twelfth thereof, which was as follows:

"12. But, unless the assault was made by the deceased upon the defendant with a dangerous or deadly weapon, and under circumstances which would put a reasonably prudent man in fear of his life or great bodily harm, there would be no justification for taking the life of James P. Hermes, and if you find from the evidence that James P. Hermes was about to assault the defendant, without a dangerous or deadly weapon, and the defendant shot and killed James P. Hermes with a premeditated design to effect his death, then such killing would amount to murder, and the instructions as to this crime previously given would apply," because thereby it denied defendant the right to exercise his right of self defense to the extent of killing said Hermes, if, from the standpoint of the defendant, it seemed to him reasonably necessary to do so in the light of the threats communicated to him, and even though a reasonably prudent man under the circumstances would have killed the defendant in what he deemed to be his necessary self defense.

288 Forty-third Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in refusing to instruct the jury at the close of all the testimony to return a verdict of not guilty in favor of the defendant, because the testimony wholly failed to support the allegation of the indictment that the defendant committed the homicide on the tract or parcel of land reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof.

Forty-fourth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in failing and refusing to give in charge to the jury defendant's special charge No. Five, which special charge, caption and signature of defendant's counsel omitted, is as follows:

"A reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time, and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant.

"If from the evidence you believe the defendant killed the said James P. Hermes, but further believe that at the time of so doing the deceased had made an attack on him, which, from the manner and character of it and the relative strength of the parties and the defendant's knowledge of the character and disposition of the deceased, caused him to have a reasonable expectation or fear of death or serious bodily injury and that acting under such reasonable expectation or fear, the defendant killed the deceased, 289 then you should acquit him; and if the deceased was armed at the time he was killed and was making such attack on defendant, and if the weapon used by him and the manner of its use were such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the deceased intended to murder or to inflict serious bodily injury upon the defendant."

Forty-fifth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in failing and refusing to give in charge to the jury defendant's special charge No. Six, which special charge, caption and signature of defendant's counsel omitted, is as follows:

"Gentlemen of the Jury:

"You are instructed that a deadly weapon is one which, from the mode and manner of its use, is reasonably calculated or likely to produce death, or inflict serious bodily injury."

Forty-sixth Assignment of Error.

The District Court of the United States for the Southern District, Corpus Christi Division, erred in failing and refusing to give in charge to the jury defendant's special charge No. Seven, which special charge, caption and signature of defendant's counsel omitted is as follows:

"Upon the law of self defense, you are instructed that if from the acts of the said James Hermes, or from his words coupled with his acts, there was created in the mind of the defendant a reasonable apprehension that he (the defendant) was in danger of losing his life or of suffering serious bodily harm at the hands of said James Hermes, then the defendant had the right to defend himself from such danger or apparent danger, as it reasonably appeared to him at the time, viewed from his standpoint. And a party so un- 290 lawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant. If you believe that the defendant committed the assault as a means of defense, believing at the time he did so (if he did do so) that he was in danger of losing his life or of serious bodily injury at the hands of said James Hermes, then you will acquit the defendant."

Forty-seventh Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in failing and refusing to give in charge to the jury defendant's special charge No. Eight, which special charge, caption and signature of defendant's counsel omitted, is as follows:

"If you believe from the evidence that previous to the homicide there had been communicated to defendant threats of the deceased to kill the defendant, or do him some serious bodily injury, and that at the time of the difficulty the acts and words, or the acts coupled with the words of the deceased, were such as to create in the mind of the defendant, viewed alone from his standpoint, a reasonable apprehension or fear that the deceased was then and there about to carry such threats into execution, and to inflict upon him, defendant, death or serious bodily injury, then you are instructed that defendant had the right to use such force as to him, viewed from his standpoint at the time, seemed reasonable and necessary to protect himself."

Forty-eighth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in failing and refusing to give in charge to the jury defendant's special charge No. Nine, which special charge, caption and signature of defendant's counsel omitted, is as follows:

291 "The defendant was where he had a right to be when the difficulty arose, and if you believe from the evidence that the deceased advanced upon him in a threatening manner and with a deadly weapon, and defendant at the time had reasonable grounds to believe, and in good faith believed that the deceased intended to take his life, or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him, in such way and with such force as under all the circumstances he, at the moment, believed and had reasonable grounds to believe was necessary to save his own life, or to protect himself from great bodily injury."

Forty-ninth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in failing and refusing to give in charge to the jury defendant's special charge No. Ten, which special charge, caption and signature of defendant's counsel omitted, is as follows:

"Gentlemen of the Jury:

"The defendant had the same right to act upon the reasonable appearance of danger as upon real danger, and if you should believe from the evidence that the defendant was not in fact in real danger of death or serious bodily injury at the hands of the deceased at the time he killed deceased, but that the defendant reasonably believed he was in danger, and acting upon such belief killed deceased, you should acquit him.

"And you are instructed that if you believe from the evidence that at the time of the killing it reasonably appeared to defendant from his standpoint at the time from the acts of the deceased, that deceased was then and there about to inflict upon him, the defendant, death or serious bodily injury, whether such was the purpose of the deceased or not, and that there was thereby created in the mind of the defendant a reasonable expectation or fear of death or serious bodily injury, then defendant had the right to kill the deceased, and was not required to resort to any other means to repel said attack, nor to retreat in order to avoid the necessity of killing the deceased, and was authorized so to act, whether such danger was real or not, provided it appeared to him, the defendant, to be real, viewed alone from his standpoint at the time."

Fiftieth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in failing and refusing to give in charge to the jury defendant's special charge No. Twelve, which charge, caption and signature of defendant's counsel omitted, is as follows:

"Gentlemen of the Jury:

"You are instructed that if you believe from the evidence that at the time of the homicide it reasonably appeared to defendant, judged from his standpoint, that the deceased was armed with a knife, and defendant further believed that he, the deceased, from the mode and manner of its use, was about to inflict on defendant therewith death or some serious bodily injury, then you are instructed that under such circumstances the defendant would be justified in resisting such assault with force, even to the extent of killing deceased."

Fifty-first Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in submitting in its main charge to the jury Paragraph Ten, which is as follows, to-wit:

293 "10. Under the plea of not guilty, the defendant is entitled to show, if he can by the evidence, that the homicide was committed in the lawful defense of himself. But, it is necessary to remember, in considering the question of self defense, that the party assaulted is always under the obligation to retreat, so long as retreat is open to him, provided he can do so without subjecting himself to the danger of death or great bodily harm."

Fifty-second Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in failing and refusing to give in charge to the jury defendant's special charge No. Fourteen, which special charge, caption and signature of defendant's counsel omitted, is as follows:

"Gentlemen of the Jury:

"In this case there is evidence that the shot that killed the deceased was the third shot fired by the defendant.

"If you believe from the evidence that such was the case, or if you have a reasonable doubt as to whether he was killed by the third shot, or by the fourth shot, and you should further believe that the fourth shot was fired with malice aforethought, express or implied, but you have reasonable doubt as to whether the third shot was fired under such circumstances that if death had resulted therefrom it would have been murder, you are, in such event, instructed that you cannot find the defendant guilty of any higher grade of offense than assault with intent to murder, for the results of such fourth shot."

Fifty-third Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division, erred in failing and refusing to give in charge to the jury defendant's special charge No. Fifteen, which special charge, caption and signature of defendant's counsel omitted, is as follows:

294 "You are instructed that it has not been shown that the United States ever acquired title to the parcel of land where the homicide occurred, or that the cession was for one of the express purposes authorizing cession, and you must therefore acquit the defendant."

Fifty-fourth Assignment of Error.

The District Court of the United States for the Southern District of Texas, Corpus Christi Division erred in failing and refusing to give in charge to the jury defendant's special charge No. Sixteen, which special charge, caption and signature of defendant's counsel omitted, is as follows:

"You are instructed that it has not been shown that the United States ever acquired title to the parcel of land where the homicide occurred, and you must therefore acquit the defendant."

Wherefore the defendant prays that said judgment be reversed.

The foregoing Assignments of Error are presented with the petition for the Writ of Error, with the request that they be filed and made a part of the record in this cause.

JAMES R. DOUGHERTY,
DOUGHERTY & DOUGHERTY,
G. R. SCOTT,
BOONE & POPE,
H. S. BONHAM,
JAMES F. ODEM,

Attorneys for Defendant, Robert B. Brown.

Indorsed: Assignments of Error. Filed before me this March 18th, 1918. Wm. B. Sheppard, Judge. Filed 9 day of Mch. 1918.

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Order Allowing Writ of Error.

Filed March 18th, 1918.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

Upon motion of H. S. Bonham, one of the attorneys for defendant, and upon the filing of petition for writ of error and bond, it is ordered that a writ of error be allowed, and the same is hereby allowed, the defendant to have reviewed in the United States Circuit Court of Appeals for the Fifth Circuit the judgment heretofore entered against the defendant herein, and that the amount of bond for costs for said writ of error is fixed at \$500.00, and the clerk of the District Court of the United States, for the Southern District of Texas, Corpus Christi Division, is hereby ordered and directed to approve the writ of error bond in said cause for the sum of \$500.00, for the defendant in said cause, and said bond shall operate as a supersedeas in this cause pending a determination thereof in the Circuit Court of Appeals for the Fifth Circuit.

Dated this 18th day of March, A. D. 1918.

WM. B. SHEPPARD,
*Judge of the United States District
Court for the Southern District of
Texas, Corpus Christi Division.*

Indorsed: Order Allowing Writ of Error and Fixing Bond. Filed 18 day of Mch. 1918.

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Citation and Acceptance of Service.

Filed March 18th, 1918.

UNITED STATES OF AMERICA, *vs.*:

The President of the United States to the United States of America
and John E. Green, Solicitor of Record, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Fifth Circuit, according to law, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of Texas, wherein Robert B. Brown is plaintiff in error to show cause, if any there be, why the decree in said Writ of Error mentioned, should not be corrected, and speedy justice should — be done to the party in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this the 18th day of March, A. D. 1918, and of the Independence of the United States the 143rd year.

WM. B. SHEPPARD,
United States District Judge.

Service of the within citation in error is hereby accepted this 18th day of March, A. D. 1918.

JNO. E. GREEN, JR.,
U. S. Attorney.

Indorsed: Citation on Writ of Error and Acceptance of Service.
Filed 18 day of Mch. 1918.

297

Writ of Error Bond.

Filed March 27th, 1918.

THE UNITED STATES OF AMERICA,
Southern District of Texas:

In the District Court of the United States of America for the Southern
 District of Texas.

No. 82, D. Cr.

UNITED STATES OF AMERICA

vs.

ROBERT B. BROWN.

Know all men by these presents:

That we, Robert B. Brown as principal, and C. M. Brown, and J. L. Du Bose, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Five Hundred Dollars, (\$500.00) to be paid the said United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, ex-ecutors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 27 March, in the year of our Lord, one thousand nine hundred and eighteen.

Whereas, lately at the January term, 1918, of the District Court of the United States for the Southern District of Texas, Corpus Christi Division, in a suit pending in said Court, between the United States of America, plaintiff, and Robert B. Brown, defendant, a judgment was rendered against the said Robert B. Brown, and the said Robert B. Brown, having obtained a writ of error and filed a copy thereof in the Clerk's office of said Court to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the United States of America, citing and admonishing the United States of

298 America to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof, service of said citation being accepted;

Now, the condition of the above obligation is such that if the said Robert B. Brown shall prosecute his writ of error to effect, and shall answer all damages and costs, if he shall fail to make his plea good, then the above obligation to be void else to remain in full force and virtue.

[SEAL.]

ROBERT B. BROWN,
Principal.

[SEAL.]

C. M. BROWN,
 J. L. DU BOSE, *Surities.*

[SEAL.]

Sealed and delivered in presence of:

H. S. BONHAM,
 THOS. WELDER.

Personally appeared before me, the undersigned authority, the above named Robert B. Brown, Principal, and C. M. Brown, and J. L. Du Bose as Surities, who acknowledged in my presence that they signed, sealed and delivered the foregoing instrument, for the purposes and considerations therein set forth.

Done at Corpus Christi, Texas, this the 27th day of March, A. D. 1918.

L. C. MASTERSON,

Clerk,

[SEAL.]

By J. A. MOUNT,

Deputy.

Approved by order of Court, this March 27th, 1918.

L. C. MASTERSON,

Clerk,

[SEAL.]

By J. A. MOUNT,

Deputy.

Oath of Surety.

I, C. M. Brown, do solemnly swear that I am worth, in my own right, at least the sum of One Hundred and Five Thousand (\$105,000.00) Dollars, after deducting from my property all that which is exempt by the constitution and laws of the state from forced sale, and after the payment of all my debts, of every description, whether individual or security debts, and after satisfying all encumbrances on my property which are known to me; that I reside in Bee County and have property in this State liable to execution worth the sum of \$105,000.00, or more.

I own 7,100 acres of land in Edwards and Reall Counties, worth at least Eight (\$8.00) Dollars per acre; 425 acres of land in Bee County, Texas, worth at least Fifty (\$50.00) Dollars per acre; one business lot in the City of Beeville, worth Five Thousand (\$5,000.00) Dollars; one-half interest in two brick buildings in the City of Beeville which cost and is worth at least Ten Thousand (\$10,000.00) Dollars; one-half interest in one frame business house and also a one-half interest in seven dwelling lots. My interest in said house and lots being worth Three Thousand (\$3,000.00) Dollars.

I also own 200 head of live stock, worth Fifty (\$50.00) Dollars per head, and have Ten Thousand (\$10,000.00) Dollars in U. S. bonds and notes.

All of this property is unencumbered.

C. M. BROWN,

Surety.

Sworn to and subscribed before me, this the 27th day of March, A. D. 1918.

[SEAL.]

L. C. MASTERSON,

Clerk,

By J. A. MOUNT,

Deputy.

Oath of Surety.

I, J. L. Du Bose, do solemnly swear that I am worth, in my own right, at least the sum of Two Hundred and Five Thousand (\$205,000.00) Dollars, after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts, of every description, whether individual or security debts, and after satisfying all encumbrances on my property which are known to me; that I reside in Gonzales County and have property in this state liable to execution worth the sum of \$205,000.00, or more.

I own 6,500 acres of land in Gonzales County, worth at least Twenty (\$20.00) Dollars per acre; 840 head of cattle, worth at least Fifty (\$50.00) per head, and I have Thirty-three Thousand (\$33,000.00) in notes, stocks and cash.

J. L. BU BOSE,
Surety.

Sworn to and subscribed before me, this the 27th day of March, A. D. 1918.

[SEAL.]

L. C. MASTERSON,
Clerk.

By J. A. MOUNT,
Deputy.

Writ of Error

Filed March 18th, 1918.

In the United States District Court for the Southern District of Texas,
Corpus Christi Division.

THE UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

The President of the United States to the Honorable Judge of the District Court of the United States for the Southern District of Texas,
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you or some of you, between the United States of America, plaintiff, and Robert B. Brown, defendant, a manifest error hath happened, to the great damage of said Robert B. Brown, defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at

New Orleans, in said circuit, on the 16th day of April, next, in the said circuit Court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit Court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 18th day of March, A. D. 1918, and in the 142nd year of the independence of the United States of America.

Allowed by:

WM. B. SHEPPARD,
United States District Judge.

Attest:

L. C. MASTERSON,
*Clerk of the District Court of the United
States, Southern District of Texas.*

[SEAL.]

Motion to Tax Defendant's Cost Against the United States.

Filed March 18th, 1918.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

To the Honorable Wm. B. Sheppard, Judge of said Court:

Now comes the defendant, Robert B. Brown, and represents to the Court that he stands charged by indictment in this cause
302 with the offense of murder, a capital crime; that this indictment was returned in this cause on the 7th day of January, A. D. 1918, and that it was returned as a substitute for a prior indictment for the same offense in cause styled United States of America v. Robert B. Brown, No. 74, which was returned and filed in this Court at the May Term, A. D. 1917.

This defendant says that soon after he was indicted in said cause he sought to have process issued to compel his necessary witnesses to appear at his trial under and by virtue of Section No. 1034 of the Revised Statutes of the United States, which provides that every person who is indicted for capital crime shall be allowed, in his defense, to make any proof that he can produce by lawful witnesses, and shall have like process of the Court to compel his witnesses to appear at his trial as is usually granted to compel witnesses to appear on behalf of the prosecution.

That at the outset, upon his presentation of the demand for such witnesses, and his request for process therefor, he was met with the refusal by this Court of the process to which he is entitled under said section 1034, unless he should make affidavit, as provided by Section 878 of the Revised Statutes, that he was an indigent defendant.

That at the time this requirement was made of him by this Court on the 19th day of June, 1917, this defendant was possessed of a small amount of money, to wit, about \$150.00, and therefore he did not feel that he should make the affidavit required of him by Section 878, but, insofar as he was able, deposited with the clerk of this Court about \$100.00, in order to secure the issuance of the process herein. That all his moneys had been expended in his defense and necessary support of his family.

That on account of the many issues involved in this cause, it became necessary for him to secure the attendance of a number of witnesses, all of whom were necessary to his defense, and defendant was denied the right to have such witnesses attend, unless he should make the affidavit mentioned or pay for his process.

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That all of said witnesses appeared in attendance on this Court on the first day of the term, and on the following day, as appears from the records of this cause, said Cause No. 74 was dismissed, and cause No. 82, D. Cr. substituted for the purpose of maintaining jurisdiction of this cause in Nueces County and defendant required the continued attendance of witnesses, in order that they might appear and testify in his necessary defense.

That on account of the number of witnesses and the protracted period of the trial, the costs accumulated so rapidly, that this defendant is now wholly unable to pay the same, and their evidence was material to his defense, and he felt that he could not go safely to trial without them.

That practically all of them lived within the district in which this Court was held, and within one hundred miles of the place of trial; that a few, who were beyond one hundred miles of the place of trial, had their transportation paid by this defendant by money secured through unsecured loans from his friends.

This defendant says that he is possessed of certain small amount of property, practically all of which is exempt; that all of his property, not exempt is encumbered practically to its full value in meeting the expense and cost that he has incurred in the trial of his cause; that the actual amount of costs incurred by him, as shown by affidavit on file with the clerk, is the sum of \$377.00; that he is unable to pay the same, and that if he should be compelled to do so, it would be necessary for him to sell some portion of his property exempt consisting substantially of his home and his household goods and teams and implements of his trade as a transfer or drayman; that he has four mules and two wagons, together with their various harnessings, and that the earnings that he derives from such teams and wagons are essential to his business, and this defendant verily believes that they are exempt under the exemption statutes of Texas, exempting all tools of trade;

304 Wherefore, this defendant says that under Section 1034 he was entitled, without affidavit, to the process of this Court, and that he has unlawfully and unjustly been denied such process, and that he should not be required, in order to have process for his witnesses to make the affidavit required by Section 878, but, if so required, he avers the foregoing facts to be true, and prays the Court for such order as may be necessary in the premises to have returned to him funds expended by him for process and attendance of witnesses in this case, as well as that the Court direct the payment of the fees and accounts of the witnesses filed herein against him, and for such other orders as the Court may deem he is entitled to in the premises.

ROBERT B. BROWN,
Defendant.

Sworn to and subscribed before me, by Robert B. Brown, this the 31st day of January, A. D. 1918.

E. A. McCAMPBELL.

[SEAL.]

Notary Public, Nueces County, Texas.

DOUGHERTY & DOUGHERTY,
Attorneys for Defendant, Robert B. Brown.

Replication to Motion to Tax Defendant's Costs Against the United States.

Filed March 18th, 1918.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

To the Honorable Wm. B. Sheppard, Judge of said Court:

305 Now comes Jno. E. Green, Jr., United States Attorney for the Southern District of Texas, and on behalf of the United States of America files this replication and motion in response to the motion for an order requiring the payment of the costs of defendant's witnesses filed this day by Robert B. Brown, defendant in the above styled and numbered cause, your attorney represents:

First. That he is advised and verily believes that the defendant, Robert B. Brown employed the law firm of Dougherty & Dougherty of Beeville, and paid or agreed to pay them a fee of from \$5,000 to \$10,000 to represent him in this cause; that he employed the firm

of G. R. Scott, Boone & Pope of Corpus Christi and paid said firm the sum of \$2,500 to assist the firm of Dougherty & Dougherty of Beeville in the trial of said cause; that if the amounts alleged to have been paid these attorneys are not correct, your attorney is informed and verily believes that substantial fees aggregating several thousands of dollars were paid these two firms.

In view of the premises and in view of the statements made in the motion sworn to by the defendant, Robert B. Brown, indicating that he has property which would be sufficient to pay the said costs, but which property is exempt under the laws of the State of Texas, your attorney prays on behalf of the United States that this motion in all things be overruled.

In the event the Court does not overrule the motion of the defendant, Robert B. Brown, then in the alternative, your attorney, on behalf of the United States, prays that the said Robert B. Brown be required to make a statement in writing and under oath listing the property which he now has, and also all incumbrances on same, in order that the Court may intelligently pass upon his motion.

Respectfully submitted,

JNO. E. GREEN, Jr.,

United States Attorney.

On this day appeared before me Jno. E. Green, Jr., United States Attorney for the Southern District of Texas, and first being duly sworn, states on his oath that the matters set forth in the foregoing replication and motion are true to the best of his information and belief.

Clerk U. S. Dist Court.

Order on Motion to Tax Defendant's Costs Against the United States.

Filed March 18th, 1918.

In the District Court of the United States for the Southern District of Texas.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN,

This motion to have the costs of the trial of Robert B. Brown, on indictment number 82 taxed against the United States, because of the insolvency of the said Brown, coming on to be heard, upon consideration thereof by the Court, it is

Ordered and adjudged that the same be denied, because the said application is made after trial, and discharge of all witnesses subpoenaed upon behalf of the defendant, and because said application does not set out the materiality of the testimony of said witnesses or that they were necessary, and because the insolvency of the defendant is not shown to the extent of justifying the expense of the witnesses to be taxed against the Government, because of his property.

To which the defendant then and there excepted.

This 18th day of March, A. D., 1918.

WM. B. SHEPPARD,
Judge.

367 *Appearance Bond.*

THE UNITED STATES OF AMERICA,
Southern District of Texas:

In the District Court of the United States for the Southern District
of Texas, Corpus Christi Division.

No. 82, D. Cr.

UNITED STATES OF AMERICA

VS.

ROBERT B. BROWN.

Know all men by these presents:

That we, Robert B. Brown, as principal, and C. M. Brown, J. L. Dubose, and Thomas Welder, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Twenty-five Thousand Dollars, (\$25,000.00), to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 2d day of April, in the year of our Lord One Thousand Nine Hundred and Eighteen.

Whereas, lately at the January Term, A. D. 1918, of the District Court of the United States for the Southern District of Texas, Corpus Christi Division, in a suit pending in said Court between the United States of America, plaintiff, and Robert B. Brown, defendant, a judgment and sentence was rendered against the said Robert B. Brown, and the said Robert B. Brown has obtained a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing
368 and admonishing the United States to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit, at the City of New Orleans, Louisiana, thirty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that, if the said Robert B. Brown shall appear in the United States Circuit Court of Appeals for the Fifth Circuit, on the first day of the next term thereof, to be held at the City of New Orleans, on the third Monday in November, A. D., 1918, and from day to day thereafter during said term, and from term to term and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Fifth Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if

the judgment and sentence of the said District Court against him shall be affirmed by the said United States Circuit Court of Appeals for the Fifth Circuit, and if said Robert B. Brown shall abide by and obey all orders made by the United States District Court for the Southern District of Texas in said cause, and shall surrender in said District Court upon the filing therein of the mandate of the said Circuit Court of Appeals for the Fifth Circuit and shall surrender himself in said District Court in any event not later than the first day of January, A. D. 1919, then the above obligation to be void, else to remain in full force, virtue and effect.

[SEAL.]

ROBERT B. BROWN,
Principal.

[SEAL.]

C. M. BROWN,

[SEAL.]

J. L. DU BOSE,

[SEAL.]

THOS. WELDER, *Sureties.*

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Signed, sealed and delivered in the presence of:

BRYAN M. WILSON,

L. D. BERRY,

Witnesses as to Principal.

G. C. ROBINSON,

H. S. BONHAM,

Witnesses as to All Sureties.

The above Supersedens bond, with Robert B. Brown as principal and C. M. Brown, J. L. Du Bose and Thos. Welder as sureties is hereby approved this April 5th, 1919.

WM. B. SHEPPARD,

U. S. Dist. Judge.

Approved this April 9th, 1918.

L. C. MASTERSON, *Clerk.*

[SEAL.]

By J. A. MOUNT, *Deputy.*

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Clerk's Certificate.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

I, L. C. Masterson, Clerk of the District Court of the United States for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of the record, assignment of errors, and all proceedings in the case as called for in the Praecipe for Transcript, on page 1 of said Transcript, in said cause No. 82 on the Criminal Docket of said Court, entitled The United States of America vs. Roberts B. Brown, as the same now appears on file and of record in my office.

To certify which, Witness my hand and the seal of said court, at Corpus Christi, in said district, this the 9th day of April, A. D. 1918.

L. C. MASTERSON,

*Clerk United States District Court,
Southern District of Texas.*

By J. A. MOUNT, *Deputy.*

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of January 28th, 1919.

No. 3232.

ROBERT B. BROWN

versus

THE UNITED STATES OF AMERICA.

On this day this cause was called, and, after argument by James R. Dougherty, Esq., for plaintiff in error, and John E. Green, Jr., Esq., United States Attorney, for defendant in error, was submitted to the Court.

Opinion of the Court.

Filed February 12th, 1919.

In the United States Circuit Court of Appeals, Fifth Circuit.

Number 3232.

ROBERT B. BROWN, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Error to the District Court of the United States for the Southern District of Texas.

James R. Dougherty (G. R. Scott, Boone and Pope, Dougherty & Dougherty, H. S. Bonham, and James F. Odem, on the brief, for plaintiff in error.

John E. Green, Jr., United States Attorney, (John R. Beasley, on the brief), for defendant in error.

Before Walker and Batts, Circuit Judges, and Grubb, District Judge.

GRUBB, District Judge:

The plaintiff in error was tried and convicted of the murder of one James P. Hermes and sentenced to a term of fifteen years in the Atlanta penitentiary for the crime of murder in the second degree. From the judgment of conviction the defendant sued out this writ of error. The plaintiff in error has assigned fifty-four errors on the

record. Instead of taking up the assignments seriatim, it will serve the ends of brevity and clearness to group them according to the various questions they present.

The first group insisted on in argument relates to the preliminary questions as to whether the defendant was properly tried in Scurry County, Texas, instead of in Bee County, the county in which the offense was committed, and as to whether the court below, at the time of the trial, still retained jurisdiction of the cause.

Section 40 of the Judicial Code provides that,—

"The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience."

Under this section the defendant applied to the District Judge for a trial in Bee County, and the court granted the application, and ordered the case set down for trial at Beeville, the county seat of Bee County, at a special term. The special term was not held. Before the case was again set for trial, the District Judge died. The case thereafter came up for hearing at Corpus Christi before the Honorable W. B. Sheppard, who had been designated to sit in the Southern District of Texas. The court, on motion of the District Attorney, dismissed the pending indictment, under which the order for a trial at Beeville had been made, and the grand jury then returned a new indictment identical in substance with the old one. The defendant objected to the dismissal of the first indictment. The propriety of the dismissal, however, is not open to question. 72 Cyc. 374. Nor could any injury have resulted to the defendant from being tried under the new indictment, unless for the reason that the court had lost jurisdiction of the offense, as contended by defendant, before the grand jury returned the second indictment, by reason of the order of the District Court changing the place of trial from Corpus Christi to Beeville. The transfer of a cause from one court to another, properly effected, would undoubtedly divest the original court of further jurisdiction, as was the case in *Smith v. Commonwealth*, 25 S. W. 107, relied upon by the plaintiff in error. In the instant case, there was no transfer from the original court to another. The prosecution was instituted in the District Court of the United States for the Southern District of Texas, Corpus Christi Division, and remained in that court until conviction and sentence. Section 40 does not contemplate a transfer of the cause to another court, but only a trial by the same court in the county where the offense was committed. The District Court in which the first indictment was returned did not part with jurisdiction over it by ordering a trial at Beeville, and, even if the subsequent trial had been had under the first indictment, the District Court sitting at Corpus Christi would have had jurisdiction to there try it. The dismissal of the first indictment and the return of the second was authorized, but, in any event, the defendant suffered no prejudice from being tried under the second indictment, instead of the first. After the return of the second indictment, the defendant reinterposed his request for a trial in Bee County, which, after a hearing, was denied. Section 40 of the Judicial Code does not confer upon a defendant an absolute right to a trial in the county where the offense was committed, but only a

qualified right in cases where such a trial could be had "without great inconvenience." The District Court is vested with discretion in making this determination. The trial judge, after a hearing, determined that a trial could not be had at Beeville without great inconvenience, for reasons recited in the order, and which do not show any abuse of discretion, if, indeed, they are not sufficient. Nothing less than an abuse of discretion would justify an interference by this court on appeal.

The second question, insisted upon by the plaintiff in error, relates to the sufficiency of the indictment on which the defendant was tried, and under which he was convicted. It is questioned for failing to sufficiently describe the locality where the alleged murder was committed to give a federal court jurisdiction. Jurisdiction in the federal court was claimed by the government under the following part of the third subdivision of section 272, chapter XI of the Penal Code:

"Or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

The indictment alleged that the United States acquired in Beeville, Bee County, Texas, a parcel of land for the public purpose of the United States, described by metes and bounds; that, prior to the date of the commission of the offense, constitutional and exclusive jurisdiction over the site of said parcel of land was ceded to the United States by the State of Texas in the manner provided by law; and that, from the date of the cession until the time of the finding of the indictment, the said parcel of land was under the exclusive jurisdiction of the United States, and was so on May 7, 1917, when the offense was there committed.

The indictment is criticised because it fails to allege the character of public use for which the parcel of land was acquired and used by the government. It may be conceded that the third subdivision of section 272 of the Penal Code confers no right on the United States to accept a cession of jurisdiction from a State for other than the purposes set out in section 272. For the purposes of this case, the use must have been for a "needful building." Exclusive jurisdiction of a tract used for a purpose other than one of the named statutory purposes would be unauthorized. The site was, in fact, acquired for a postoffice, but the indictment avers only that it was acquired for public purposes. It is contended that this is a fatal defect because the locality of the offense was jurisdictional, and the indictment must show jurisdiction on its face. The indictment does identify the tract on which the crime is alleged to have been committed by describing it by metes and bounds, and also by alleging the date of the cession of jurisdiction by the State of Texas to the United States. The defendant was fully informed as to the locus of the alleged offense and the claim of exclusive federal jurisdiction arising from it, and it is difficult to see how he could have been prejudiced by the imperfect averment if there was one, and why it should not, therefore, within the terms of section 1025, R. S., be deemed sufficient.

Again, the place being sufficiently described, if the court judicially notices its character, then neither averment nor proof of it would be essential. In the case of *Jones v. United States*, 137 U. S. 202, the Supreme Court said, on page 212:

"Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."

And again, on page 214, the court said:

"All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings."

In that case it was held that an executive proclamation that the Island of Navassa, on which a murder was charged to have been committed, appertained to the United States by determination of the President, was basis for the court's taking judicial notice that it was a place under the sole and exclusive jurisdiction of the United States. In this case, exclusive federal jurisdiction depended upon a written application by the United States to the Governor of Texas for a cession of jurisdiction, the cession by the Governor of such jurisdiction and its acceptance by the United States. In line with the case cited, we hold that the federal courts take judicial knowledge of the documents mentioned and of the character of the place described in the indictment, as to jurisdiction resulting from them. In the case of *Holt v. United States*, 218 U. S. 245, the Supreme Court said of an indictment, which alleged that an offense was committed "within the Fort Worden Military Reservation, a place under the exclusive jurisdiction of the United States":

"The indictment is well enough. The words quoted at the outset convey with clearness sufficient for justice that the Fort Worden Military Reservation was under the exclusive jurisdiction of the United States at the time of the murder."

The case of *Benson v. United States*, 146 U. S. 325, 330, 331, is to the like effect.

Again, we think the averment that "on the 21st day of September, A. D. 1915, constitutional and exclusive jurisdiction over the site of said lot, tract and parcel of land was ceded to the United States of America by the said State of Texas in the manner provided by law," is a sufficient averment of a cession for one of the purposes enumerated in the third subdivision of section 272 of the Penal Code and which authorize the United States to accept such a cession; upon the principle that public acts of public officials are presumed to be rightly executed. The application for the cession, the cession and its acceptance, were acts done by the respective federal and state officials in the line of their official duties, and are presumed from the cession and its acceptance to have been properly done, especially

when, as in this case, possession and exercise of jurisdiction follow the grant. 12 Civ. 389.

Article 5275 of the Revised Civil Statutes of Texas (1911) authorized the governor, upon written application being made to him for that purpose by the United States, accompanied with proper evidence of the acquisition by the United States "for any of the purposes and in either of the modes authorized by this title" of lands, which are described therein by metes and bounds, to cede exclusive jurisdiction over such lands to the United States. That title (Article 5275) authorizes the United States to acquire lands in Texas as sites on which to erect and maintain post-offices. When the governor executes the cession, it will be presumed that the requirements of that Act (R. S. Texas, 1911, Secs. 5252-5275, 5276) and of the United States Penal Code have been complied with.

The plaintiff in error also questions the authority of the governor, under the general power conferred by section 5275, *supra*, to cede jurisdiction in specific instances without legislative direction in each specific case. We do not agree that section 5275 delegates legislative power to the governor. The blanket consent of the State is contained in section 5275 for all government acquired lands, upon certain terms and conditions. The governor is empowered to determine when the conditions that make the legislative consent applicable have occurred. That there is no unconstitutional delegation of legislative power to the executive in this is consistent with the holding of the Texas Court of Criminal Appeals in the case of *Baker v. State*, 83 S. W. 1122, and of the Supreme Court of the United States in the case of *Field v. Clark*, 143 U. S. 649, 694.

The plaintiff in error also assigns error based upon the action of the District Court in permitting certain deeds and other muniments of title to go to the jury without proper proof of their execution. The United States was in possession, through contractors, engaged in excavating for a postoffice, of the land where the murder was committed, when it was committed. The defendant himself was a contractor under the government, and claims to have been rightfully on the premises, when he killed Hermes, by virtue of that relation to the government. The witnesses orally described the place of the killing as the postoffice site. In this state of the record, the government was not required to prove its title, as in an action of trespass, and the introduction of the deeds and title documents could not have injured the defendant, whether technically proven or not. In the case of *Holt v. United States*, 218 U. S. 245, 251, the Supreme Court said:

"Several objections were taken to the admission and sufficiency of evidence. The first is merely an attempt to raise technical difficulties about a fact which no one really doubts, namely, that the band barracks, the undisputed place of the crime, were within the exclusive jurisdiction of the United States. A witness testified that they were within the inclosure of Fort Worden under military guard and control, from which all unauthorized persons are excluded, and that he knew that the fence was coincident with the boundaries shown on a map objected to but admitted. He identified the band barracks as described in certain condemnation proceedings. The State of Washington had assented by statute to such proceedings and

Congress had authorized them. The deeds and condemnation proceedings under which the United States claimed title were introduced. The witness relied in part upon the correctness of official maps in the Engineers' Department made from original surveys under the authority of the War Department, but not within his personal knowledge, and he referred to a book showing the titles to Fort Worden compiled under the same authority. The documents referred to are not before us, but they properly were introduced, and so far as we can see justified the finding of the jury, even if the evidence of the de facto exercise of exclusive jurisdiction was not enough, or if the United States was called on to try title in a murder case. We think it unnecessary to discuss this objection in greater detail."

Another group of assignments of error present the correctness of the rulings of the District Court upon the applicable law of self-defense. The District Judge charged the jury that the defendant might owe the deceased a duty to retreat under certain conditions, though the deceased was approaching him with a knife in his hand. The plaintiff in error's contention limits the duty to retreat to cases in which the deceased assaults his slayer without a deadly weapon. A tendency of the evidence was to the effect that the deceased Hermes approached defendant with an open knife in his hand, with which he attempted to strike defendant. The evidence without conflict showed that the defendant, on the approach of Hermes, retreated 20 or 25 feet to where he had left his raincoat, in which was his pistol, and, after obtaining his pistol from it, stood his ground, using his pistol with fatal effect on Hermes. The defendant was rightfully where he was at the time of the quarrel, but was not on his own premises. These facts make pertinent the question whether one who is assailed by another with a deadly weapon is under all circumstances excused, by that circumstance, from any duty to retreat from his assailant, if himself without fault in provoking the assault. This is the contention of the plaintiff in error's counsel urged in an able argument and brief. We are not convinced by it that there is a hard and fast rule that he who repels an assault made by another with a deadly weapon may, because of the character of the weapon used by his assailant, repel force with force to the extent of taking life, without retreating, though he could retreat with safety to himself. In the case of *Beard v. United States*, 158 U. S. 550, the Supreme Court held that one who was assaulted on his own premises, though not in his dwelling house, could repel the assault to the extent of taking his assailant's life, if necessary, without retreating. In the case of *Alberty v. United States*, 162 U. S. 499, 505, the Supreme Court held that one who killed another, who, in the night time, was endeavoring to enter the window of a room, in which was his wife, and who, upon the approach of the defendant, threatened to kill him, and made demonstrations to that end, was justified in killing the deceased, without retreating to avoid doing so. In the former case, the Supreme Court quotes from cases in other jurisdictions, and apparently with approval, the language of the opinions in which would indicate that the duty of one to retreat, when violently assaulted, had no place in

modern criminal law. However, in the subsequent case of *Allen v. United States*, 164 U. S. 492, 497, the Supreme Court held the charge of the trial court to be correct, which contained this language:

"The law of self-defense is a law of proportions as well as a law of necessity, and it is only danger that is deadly in its character, or that may produce great bodily harm, against which you can exercise a deadly attack. If he is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm from which death or permanent injury may follow, in such a case he may lawfully kill the assailant. When? Provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling him without killing him, if it be in his power. The act coming from the assailant must be a deadly act, or an act that would produce great violence to the person, under this proposition. It means an act hurled against him, and that he has not created it, or created the necessity for it by his own wrongful, deadly or dangerous conduct—conduct threatening life. It must be an act where he cannot avoid the consequences. If he can, he must avoid them, if he can reasonably do so with due regard to his own safety."

Of this charge, the Supreme Court said:

"Nor is there anything in the instruction of the court that the prisoner was bound to retreat as far as he could before slaying his assailant that conflicts with the ruling of this court in *Beard v. United States*, 158 U. S. 550. That was the case of an assault upon the defendant upon his own premises, and it was held that the obligation to retreat was no greater than it would have been if he had been assailed in his own house. So, too, in the case of *Alberty v. United States*, 162 U. S. 499, the defendant found the deceased trying to obtain access to his wife's chamber through a window, in the night time, and it was held that he might repel the attempt by force, and was under no obligation to retreat if the deceased attacked him with a knife. The general duty to retreat instead of killing when attacked was not touched upon in these cases. Whart. on Homicide, §485."

It is true that the assault on the defendant in the *Allen* case, as shown by the statement of facts on a former appeal, was not made with a deadly weapon, but the Supreme Court assumed, as did the trial court, that the facts in the record showed it might have been made under circumstances that created a necessity for repelling it, either without retreating or only after having retreated, as the jury might infer. The general rule as to the duty of retreat is set out by Wharton in the section cited by the Supreme Court as follows:

"In case of personal conflict, it must appear, in order to establish excusable homicide in self-defense, that the party killing had retreated, either as far as he could, by reason of some wall, ditch or other impediment, or as far as the fierceness of the assault would permit him. * * * The true view is that a 'wall' or 'ditch' is to be presumed whenever retreat cannot be further continued without probable death, and when the only apparent means of escape is to attack the pursuer. And retreat need not be attempted when the attack is so fierce that the assailed, by retreating, will apparently expose himself to death."

When the person assaulted is not on his own premises or in his own house, and is not engaged in preventing an independent and forcible felony, but, while engaged in a personal and unprovoked conflict, is seeking to defend his own life, we think the proper rule is that before repelling force with force, to the extent of taking life, he must retreat to avoid injury to himself, provided that he can retreat with reasonable safety to himself, unless the circumstances are such as would lead a prudent man reasonably and in good faith to believe that, contrary to the facts, retreat would bring upon him danger to his life or limb. This issue is to be determined by the jury from all the attendant facts, and does not depend upon the existence of one alone, for illustration, the use by the assailant of a deadly weapon. It is manifest that an assault with a knife, as distinguished from a gun, might be made from such a distance as that the person assaulted could by retreat escape with no risk. The law, in its tenderness for human life, does not authorize the taking of life to repel such an assault. An assault without a deadly weapon, because of great disparity of strength might become fatal if the assailant closed with his adversary. If the manifest purpose of the strong assailant was to kill or rape, then the weak person assaulted might be able to attain safety only by repelling it from a distance, by shooting the assailant. We think it clear that the Beard and the Alberty cases are exceptions only to a general rule, which requires retreat where, in fact and appearance, retreat is safe, and that the general rule applies to the facts of this case. The deceased approached the defendant in the day time from a distance. If he had a weapon, it was a knife only, and not formidable at a distance. The defendant had time to, and did retreat 25 feet, to get his pistol. If the jury believed that he could by further retreat, have avoided injury, and that a reasonably prudent man would have drawn this conclusion from the circumstances and character of the assault, then it was the defendant's duty to have retreated, and, failing to do so, he is not to be excused for killing the deceased. The court was not in error in imposing this limited duty of retreat upon the defendant.

The charge of the court is criticised for not defining a deadly weapon. It contains a definition of that term which we think sufficient. The court's charge left to the jury to determine which was in fact, the fatal shot of the four fired by the defendant, and permitted the jury to acquit the defendant of responsibility for murder because of the fourth shot, if they found that the third was the only fatal one. The charge is also criticised because of the asserted repeated references to the duty to retreat contained in it. We do not think there was unwarranted iteration in this respect. There was a portion of the charge that omitted reference to the element of apparent as distinguished from actual danger to be apprehended from the alleged assault on defendant by the deceased. No exception was reserved to this part of the charge separately, and no ground of exception to the charge in its entirety covers the point. The charge, in other portions, covered the doctrine of apparent danger. The omission in the part complained of would doubtless have been supplied if the court's attention had been directed to it before sub-

mission to the jury. No reversible error can be predicated upon an omission, first complained of after verdict. We think the charge of the court fairly covered the law of the case.

The plaintiff in error assigns the refusal of a number of special requests to charge. Of them, without specific reference to each, we may say that those that asserted correct legal propositions were substantially charged in the general charge of the court.

Finding no reversible error in the record, the judgment is Affirmed.

(Original Filed February 12th, 1919.)

Judgment.

Extract from the Minutes of February 12, 1919.

No. 3232.

ROBERT B. BROWN

versus

THE UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed.

Order Extending Time to File Petition for Rehearing.

Extract from the Minutes of February 24, 1919.

No. 3232.

ROBERT B. BROWN

versus

THE UNITED STATES OF AMERICA.

On consideration of the application of counsel for plaintiff in error, it is ordered by the Court that the time for filing a petition for rehearing herein be and the same is hereby extended for a period of fifteen days.

Petition for Rehearing.

Filed March 13th, 1919.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 3232.

ROBERT B. BROWN, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Error to the District Court of the United States for the Southern District of Texas.

Petition for Rehearing of Plaintiff in Error.

To the Honorable United States Circuit Court of Appeals for the Fifth Circuit:

Now comes the plaintiff in error in the above numbered and styled cause, and humbly petitions that the judgment rendered against him by this Court in said cause on February 12th, A. D. 1919, be set aside, and that he be granted a rehearing for the following reasons, to-wit:

First.

Because this Court erred in holding that it could take judicial knowledge of the fact that the tract of land described by metes and bounds in the indictment as the locus of the crime was acquired by the United States for a postoffice building site, and was ceded by the State of Texas to the United States for such purpose, and that the specific allegations of such facts in the indictment were therefore not necessary to the validity of the indictment.

Statement.

The indictment was as follows, to-wit:

Indictment No. 82.

Filed January 8th, 1918.

In the Name and by the Authority of the United States of America.

"In the District Court of the United States of America for the Southern District of Texas, in the Fifth Circuit, Corpus Christi Division.

"At a stated term of the District Court of the United States of America for the Southern District of Texas, in the Fifth Circuit

begun and held at Corpus Christi within and for the district and circuit aforesaid on the first Monday in January, the same being the seventh day of January, in the year of our Lord, Nineteen Hundred and Eighteen.

"Southern District of Texas:—The Grand Jurors of the United States of America, duly selected, impaneled, tried, sworn and charged to inquire into and due presentment make of offenses against the laws of the United States of America in and for the District, division and circuit aforesaid, on their oaths in said court present:

"That long prior to the 7th day of May, A. D. 1917, the United States of America acquired within the geographical limits of Beeville, Bee County, Texas, within the division, district, and circuit aforesaid, a certain lot, tract, and parcel of land for the public purpose of the said United States of America, said land being in three separate tracts as follows, to-wit:

(Field notes omitted.)

"That after the acquisition of said land, and long before the 7th day of May, A. D. 1917, to-wit, on the 21st day of September, A. D. 1915, constitutional and exclusive jurisdiction over the site of said lot, tract and parcel of land was ceded to the United States of America by the said State of Texas in the manner provided by law; that from the date of the deed of cession of jurisdiction to the present time the site aforesaid has been under the exclusive jurisdiction of the United States of America and was under the exclusive jurisdiction of the United States of America on May 7, 1917, and now is under the exclusive jurisdiction of the United States of America.

"That one Robert B. Brown, on the 7th day of May, A. D. 1917, in said district, division and circuit, aforesaid, and on that said lot, tract and parcel of land hereinbefore more particularly described theretofore acquired by the United States of America for the exclusive use of the United States of America for its public purposes, the said lot, tract and parcel of land then and there being a place under the sole and exclusive jurisdiction of the United States of America and out of the jurisdiction of any particular state, and within the jurisdiction of this Court, constitutional and exclusive jurisdiction over said lot, tract and parcel of land having been ceded to the United States of America by the said State of Texas in the manner provided by the law long prior to the commission of the offense herein-after alleged: did, unlawfully, willfully and purposely, and with malice aforethought, and with a deadly weapon, to-wit, a pistol held in his hands and loaded with cartridges charged with gun powder and metal bullets, make an assault upon the body of one James P. Hermes, a human being; and did unlawfully, willfully, purposely, and with his malice aforethought, and with intent to kill and murder, then and there shoot off and discharge the contents of said pistol upon and into the body of the said James P. Hermes; and the said Robert B. Brown, with one of the said bullets aforesaid, out of the said pistol aforesaid, then and there by force of the gun powder aforesaid, by the said Robert B. Brown discharged and shot off as aforesaid, then and there willfully, unlawfully, purposely, and with malice aforethought, did strike, penetrate, and wound him, the said James P. Hermes, in and upon the anterior surface of the thigh,

breaking the bone of the upper leg of the said James P. Hermes; and with one of the said bullets aforesaid, discharged from said gun aforesaid, by the said Robert B. Brown, then and there willfully, unlawfully, purposely and with malice aforethought, did strike, penetrate and wound him, the said James P. Hermes, in and upon the left side of the chest coursing under the skin and lodging on the point of the left shoulder of the said James P. Hermes; and with one of the said bullets aforesaid, discharged from said gun as aforesaid, by the said Robert B. Brown, then and there willfully, unlawfully, purposely, and with malice aforethought, did strike, penetrate and wound him, the said James P. Hermes in and upon the left side of the chest, coursing under the skin and lodging under the left armpit of the said James P. Hermes; and with one of the said bullets aforesaid, discharged from said gun as aforesaid, by the said Robert B. Brown then and there willfully, unlawfully, purposely and with malice aforethought, did strike, penetrate and wound him, the said James P. Hermes, in and upon the chest about one inch to the left of the breast bone and between the fifth and sixth ribs, tearing a hole in the thoracic aorta of the said James P. Hermes; the said bullets aforesaid inflicting upon him, the said James P. Hermes, wounds of which said wounds so inflicted as aforesaid, on the said lot, tract and parcel of land hereinbefore referred to, as aforesaid, the said James P. Hermes did then and there die.

"And so the Grand Jurors aforesaid, upon their oath aforesaid, do further say and charge, that upon the day aforesaid, at the place aforesaid, on the said land acquired by the United States of America for its exclusive use, as aforesaid, with the said deadly weapon, and in the manner and form aforesaid, and used as aforesaid, the said Robert B. Brown did unlawfully, willfully, purposely, and with his malice aforethought, kill and murder the said James P. Hermes, a human being; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

"G. M. WILSON,

Foreman of the Grand Jury.

"JOHN E. GREEN, Jr.,

United States Attorney,

Southern District of Texas."

Tr. of Rec., p. 5 to 9.

Authorities.

On proposition that where the territorial jurisdiction of the court depends on facts in pais, not of common notoriety, and is not based upon a public statute, the court will not take judicial notice thereof:

Peyroux et al. vs. Howard, 7 Peters, 342-44.

United States vs. Rio Grande Dam. & Ir. Co., 174 U. S. 696-98.

United States vs. Wiltberger, 5 Wheaton, 101-102.

People vs. Collins, 39 Pacific, p. 17.

U. S. vs. Crawford, Case No. 14, 890; 25 Fed. Cas. p. 694.

Gunning vs. People, 59 N. E. p. 494.
 City of Topeka vs. Cook, 84 Pac. p. 376.
 Chamberlayne on Evidence. See 657, Vol. 1, p. 833.
 Brune vs. Thompson, 2 Q. B. (1842).
 U. S. vs. Montello, 11 Wallace, 416.
 U. S. vs. Jackalow, 65 U. S. 484.
 U. S. vs. Anderson, Case No. 14,448; 24 Fed. Cas. 813.

Second.

Because this court erred in not holding the indictment upon which the judgment of conviction was had herein is fatally defective, and charged no offense within the jurisdiction of the United States Court, since it does not appear therefrom that the homicide was committed on lands ceded to the United States by the State of Texas for any of the purposes for which cession of jurisdiction is authorized by the Constitution and laws of the United States, nor does it appear from the indictment that said tract of land was acquired by the United States for a postoffice building site, nor that jurisdiction was ceded over such tract of land for such purposes, nor does it appear from the indictment that the offense was committed on such postoffice site.

Statement.

See Indictment *supra*.

Authorities.

1st. On proposition where the language of the indictment alleges the territorial jurisdiction of the United States over the locus of the crime to be by cession from the State, in language broad enough to cover purposes which would not warrant a cession of jurisdiction under the Constitution, Art. 1, Sec. 8, Par. 17, the indictment is insufficient:

United States vs. Reese, 92 U. S. 214.
 United States vs. Steffens, 100 U. S. 98.
 Rev. Edition Rose's Notes, Vol. 1, p. 58.

2nd. On proposition that an allegation that jurisdiction of the locus of the crime was ceded for the purpose of a postoffice building or at least that the killing occurred on a postoffice building site was essential to the validity of the indictment:

United States vs. Lewis, 36 Federal, p. 449.
 Franklin vs. United States, 21 Pac. Rep. Ann. p. 35.
 First Colorado Reports, p. 35 (S. C.)
 In re Kelley, 71 Fed. p. 545.
 U. S. vs. Tierney, 28 Fed. Case No. 16,517.
 U. S. vs. Tichenor, 12 Fed. Rep. p. 415.
 U. S. vs. Carll, 105 U. S. 611.

3rd. On proposition that allegations that homicide occurred on tract over which the United States had jurisdiction, and over which

the State had ceded constitutional and exclusive jurisdiction, were mere conclusions of the pleader and insufficient to charge that the land was ceded for specific purpose of a postoffice site.

Ritchie vs. McMullen, 159 U. S. pp. 241-242.

Early vs. Commonwealth, 24 S. E. 933.

State vs. Carlson, 62 Pac. p. 1019.

Pye vs. Wyatt, 151 S. W. R. 1088.

4th. On proposition where offense is statutory, every element of the offense must be clearly and accurately set forth free from all ambiguity:

United States vs. Cook, 84 U. S. 17.

United States vs. Cruikshank, 92 U. S. 542.

Ladbetter vs. U. S. 170 U. S. 610.

United States vs. Carll, 15 Otto, 611-613.

5th. On proposition that the locus of the crime was ceded for one of the particular purposes authorized is one of the elements of the offense of murder:

Sec. 272 of Judicial Code.

United States vs. Wiltberger, 5 Wheaton, 101-102, (opinion by Marshall, C. J.).

Third.

(a) This Court erred in holding that the trial court did not err in instructing the jury that plaintiff in error, though in a place where he had a right to be, and though the deceased was making a felonious assault upon him, with intent to kill him, or do him some serious bodily injury, was obliged to retreat, though without fault on his part, to the ditch or wall, before he could exercise his right of self defense, and slay the deceased.

(b) This court erred in not holding that the trial court erred in refusing to instruct the jury, as requested by defendant in his Special Charge No. 9.

Statement.

At the time that Brown shot the deceased, according to the testimony of the defendant himself, the deceased was striking at him with a knife, which had a blade about three or three and one-half inches long, and he, the defendant, reasonably thought that the deceased was endeavoring to kill him. See testimony of Brown, set out in full in Tr. of Rec. pages 195-199; 201-204, and in plaintiff in error's brief, pages 148-159, and see testimony of threats.

The testimony of plaintiff in error that at the time he fired at Hermes, the latter was approaching him and striking at him with a knife was strongly corroborated by the testimony of the following witnesses:

I. A. Doughty, Tr. of Rec. pp. 148-152 and in plaintiff in error's brief, pp. 135-138.

John Ruebush, Tr. of Rec. pp. 169-173, and in plaintiff in error's brief, at pages 141-146.

Dave Stockbridge, Tr. of Rec. pp. 172-175 and in plaintiff in error's brief, at pages 146-148.

Victor Globea, Tr. of Rec. pp. 155-156, and in plaintiff in error's brief, at pages 139-140.

Diego Rodriguez, Tr. of Rec. pp. 157-160, set out in plaintiff in error's brief, at pages 140-141.

Joe Thornton, sheriff of Bee County, Texas, Tr. of Rec. pp. 163-165, and in plaintiff in error's brief, at pages 163-164.

Testimony of Threats.

J. M. Pickett, Tr. of Rec., pp. 165-166, set out in plaintiff in error's brief at page 164.

John Murphy, Tr. of Rec. pp. 176-177 set out in plaintiff in error's brief, at pages 164-165.

Jack Carvel, Tr. of Rec. pp. 179-180 set out in plaintiff in error's brief, at pages 167-169.

Rufus Taylor, Tr. of Rec. pp. 181-182, set out in plaintiff in error's brief, at pages 169-170.

Oscar Francis, Tr. of Rec. pp. 185-186 set out in plaintiff in error's brief, pages 173-174.

Hiram Cheney, Tr. of Rec. pp. 186-187, set out in plaintiff in error's brief, page 175.

The trial court charged the jury by Paragraphs 10, 11, 1*f-b*, 13*c*, 14 and 15. Tr. of Rec., pp. 236 to 238, on defendant's duty to retreat; which are as follows:

"10. Under the plea of not guilty, the defendant is entitled to show, if he can by the evidence, that the homicide was committed in the lawful defense of himself. But, it is necessary to remember, in considering the question of self-defense, that the party assaulted is always under the obligation to retreat, so long as retreat is open to him, provided he can do so without subjecting himself to the danger of death or great bodily harm.

"11. If you believe from the evidence, that the defendant shot and killed James P. Hermes, at the time when the said James P. Hermes was making an assault upon the defendant, with a dangerous or deadly weapon, that is, with a weapon capable of inflicting death or great bodily harm and under such circumstances as to put a reasonable man in the position of the defendant in fear of his life, or great bodily harm; and such circumstances would appear to a reasonable mind, as making retreat or attempted retreat dangerous to his personal safety; then the defendant would be justified in standing his ground, and resisting the attack with all necessary force; even to the taking of the life of his assailant, and in such case you would find the defendant not guilty.

"13*b*. If, however, you believe from the evidence, that at the time of the killing it would have appeared to a reasonably prudent man, situated as the defendant was, and in the circumstances of the

defendant, that the deceased was armed with a deadly or dangerous weapon, and the defendant had reasonable ground to believe that the deceased, from the mode and manner of the use of such weapon, was about to inflict on defendant, or that there was apparent danger of his inflicting upon defendant death or some serious bodily injury; and retreat was apparently dangerous, then you are instructed, that under such circumstances the defendant would be justified in resisting the assault with all necessary force, even to the extent of killing the assailant.

"13-c. If you believe from the evidence, that previous to the homicide there had been communicated to defendant threats of the deceased to kill defendant or do him some serious bodily harm, and that at the time of the difficulty the acts and words of the deceased, accompanied with demonstrations evincing a purpose to put into effect such threats in such a manner as to create in the mind of a reasonable man a reasonable apprehension or fear that the deceased was then and there about to carry such threats into execution and to inflict upon defendant death or serious bodily harm; then you are instructed that the defendant had the right to use such force as would be reasonably necessary to protect himself; provided that he was unable to retreat and avoid the conflict, or that an attempt to do so would have appeared dangerous to a reasonable man under the circumstances of the attack.

"14. If you believe from the evidence that at the time of the homicide the deceased made an assault upon the defendant with a deadly weapon, and defendant's knowledge of the character and disposition of the deceased would have caused a reasonable man in the situation of the defendant to have entertained fear of death or serious bodily injury; when retreat or any attempt to retreat would have appeared dangerous to a reasonable man, and that, acting under such reasonable fear, the defendant killed the deceased in repelling the assault, then you should find the defendant not guilty.

"15. If the deceased was armed at the time of such assault, and was making such an attack on defendant, with a deadly weapon, as would put a reasonable man in fear of death or serious bodily harm; then the defendant would be justified in believing that the deceased intended to kill or inflict serious bodily harm upon him, and if retreat would have appeared to a man of reasonable prudence, in the position of the defendant, as involving danger of death, or serious bodily harm, then the defendant was entitled to stand his ground, and repel force with force, even to the extent of taking the life of his assailant."

The defendant requested a Special Charge No. 9, which was overruled; said charge is as follows:

"Gentlemen of the Jury:

"The defendant was where he had a right to be when the difficulty arose, and if you believe from the evidence that the deceased advanced upon him in a threatening manner and with a deadly weapon, and defendant at the time had reasonable grounds to believe, and in good faith believed that the deceased intended to take his life, or do

him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him, in such way and with such force as under all the circumstances he, at the moment, believed and had reasonable grounds to believe was necessary to save his own life, or to protect himself from great bodily injury." *Tr. of Rec.*, pp. 252-253.

Authorities.

1st. Where the question of whether or not, as an element of the crime of murder, one is bound to retreat when assaulted feloniously before he may slay his assailant is not fixed by statute, resort must be had to the early common law, viz.—as it was prior to 1776 to determine the legal issue thus presented:

1 Wharton's *Crim. Law* (11th Ed.) Sec. 296, 297.

U. S. vs. Palmer et al., 3 Wheat., p. 630, (4th L. Ed. p. 477,

Decision by Marshall, C. J.)

U. S. vs. Smith, 5 Wheat., 153-160, (5th L. Ed. p. 57).

Pettibone vs. U. S., 148 U. S. 197-203.

12 *Corpus Juris*, 198.

2nd. On proposition that the United States has no common law to which reference may be made to ascertain an element of an offense not expressly defined by statute.

United States vs. Hudson, 7 Cranch, 32.

Tennessee vs. Davis, 100 U. S. 257.

3rd. On proposition that at the early common law, a party resisting an assault by one who was endeavoring to commit a known felony upon him, such as murder was not compelled to retreat before slaying his assailant.

Rowe vs. United States, 164 U. S., pp. 546-558.

Russell on Crimes (3rd Am. Ed.) Vol. 1, pp. 508-516-521.

3 *Greenleaf on Evidence*, Secs. 114-115-116.

Foster's Crown Cases, 273.

Coke (3 *Institutes*, pp. 55-56).

Hale's Pleas of the Crown, Chap. 40.

East Pleas of the Crown, 271.

Erwin vs. State, 29 *Ohio State*, 186.

Bishop's New Cr. Law (8th Ed.) Vol. 1, Secs. 850-851-853.

Beard vs. U. S., 158 U. S. 550.

U. S. vs. Wiltberger, Case No. 16,738, 3 *Wash. C. C.* 515.

Runyan vs. State, 26 *Am. Rep.* 52.

Suell vs. Derricott, 49 *Southern*, (Ala.) 897.

Carpenter vs. State, 36 *S. W. R.* 905.

Cain's Case, 29 *W. Va.* 679.

State vs. Clark, 41 *S. E.* 207.

Aldrich vs. Wright, 16 *Am. Rep.* 339, 53 *N. H.* 398.

Fourth.

This court erred in holding that the District court did not err in admitting in evidence the instruments purporting to be deed and the certified copies thereof from Ed Swanton and wife, and from A. Praeger and wife to the United States, without proof of their execution.

Statement.

The several instruments mentioned above were admitted in evidence without proof of their execution.

Authorities.

Art. 3700 R. S. of Texas, and authorities cited in brief, page 110.

Fifth.

This court erred in holding that the court below did not err in admitting in evidence the instrument purporting to cede jurisdiction to the United States, because there was no evidence that the land had been acquired by the United States for a purpose which warranted the cession, and because it did not appear from the instrument itself that it was made for any of the purposes mentioned in Art. 1, Sec. 8, Par. 17, of the Constitution of the United States.

Statement.

The instrument itself did not declare that it was executed for any constitutional purpose. It was as follows, to-wit:

"THE STATE OF TEXAS,

"County of Travis:

"Know all Men by These Presents:

"That I, James E. Ferguson, Governor of the State of Texas, and acting in such official capacity, and in the name and in behalf of the State of Texas, in consideration of the fact that the United States of America has acquired for its public purposes the premises herein-after described and has made written application for the cession of jurisdiction over the said premises, under the terms and authority of Articles 5275 and 5276 Revised Civil Statutes of Texas, of 1911, do hereby cede to the United States of America constitutional and exclusive jurisdiction over the following described premises, to-wit:

(Field Notes omitted.)

"Conditioned, however, that the State of Texas hereby retains and reserves concurrent jurisdiction with the United States over the premises so ceded, and every portion thereof, so far, that all process, civil or criminal, issuing under the authority of this State, or any of the

courts or judicial officers thereof, may be executed by the proper officers of this State upon any person amenable to the same within the limits of the land so ceded, in like manner and with like effect as if no such cession had taken place.

"In testimony whereof, I have caused the seal of the State of Texas to be affixed.

"Done at the City of Austin, on the 21st day of September, A. D. 1916.

[SEAL.]

(Signed)

JAS. E. FERGUSON."

Tr. of Rec. pp. 85-86; set out in plaintiff in error's brief, pages 119-120.

Sixth.

This court erred in holding that no exception was preserved to the error in Paragraph 12 of the Court's charge, because exception was preserved to that portion of the charge before same was presented to the jury. See paragraph 7th of exception to charge, Tr. of Rec. p. 245. Special charges were also requested and refused, pointing out and covering this error.

Statement.

Exceptions, Tr. of Rec., p. 245, Par. 7th.

Seventh.

This court erred in not holding that the Trial Court erred in failing to submit to the jury the difference in the culpability of the defendant, depending upon whether it was the third or fourth shot that killed the deceased, and in this connection the court should have submitted the issue of assault with intent to murder, as requested by the 14th Special Instruction, requested by the court.

Statement.

There was evidence that the third shot was the one which inflicted the fatal wound. See testimony of Brown, Tr. of Rec. p. 195-204, and of Dr. Hensley, Tr. pp. 187-191, and of Dr. Giles, Tr. of Rec. pp. 191-194.

Under the theory of the Government, if the third shot caused the fatal wound, the defendant would not have been guilty of a higher offense than manslaughter, while if the fourth shot caused the death of deceased, defendant might be guilty of murder.

On behalf of the Government Doctors Eglert and Landier, as experts, testified that the fourth shot caused the death of the deceased. The question as to which shot caused the death of deceased became a material issue in the case.

Defendant requested a special charge No. 4, submitting his degree of culpability. See statement set out.

The whole theory of the Government's case, that the homicide was murder, depended upon whether or not the fourth shot was the one that inflicted the fatal wound. The issue was sharply made.

See testimony of Albert Wollschlaeger, Tr. of Rec., pp. 128-131.

See testimony of Robert B. Brown, Tr. of Rec., pp. 195-204 plaintiff in error's brief, pp. 148-159.

Dave Stockbridge, Tr. of Rec., pp. 173-175, plaintiff in error's brief, pp. 146-148.

J. A. Doughty, Tr. of Rec. pp. 148-152, plaintiff in error's brief, pp. 135-138.

Victor Gobeau, Tr. of Rec., pp. 155-156, plaintiff in error's brief, pp. 139-140.

Diego Rodriguez, Tr. of Rec., pp. 157-160, plaintiff in error's brief, pp. 140-141—referred to above contra.

Authorities.

Stevenson vs. United States. 162 U. S. 314-317

Seventh-a.

This court erred in not holding that the court below erred in not submitting the issue of assault with intent to murder to the jury.

Proposition.

Where the evidence raises an issue as to whether or not the defendant was guilty of a lower grade of crime than manslaughter, the court should charge the jury thereon.

Statement.

Defendant excepted to the charge of the court, before it was read to the jury, because it did not submit the offense of assault with intent to murder. See Tr. of Rec., p. 244, Par. Three of Exceptions.

The defendant also requested the court to submit as charge to the jury Special Requested Instruction No. 14, which is as follows, to-wit:

"Gentlemen of the Jury:

"In this case there is evidence that the shot that killed the deceased was the third shot fired by the defendant.

"If you believe from the evidence that such was the case, or if you have a reasonable doubt as to whether he was killed by the third shot or by the fourth shot, and you should further believe that the fourth shot was fired with malice aforethought, express or implied, but you have a reasonable doubt as to whether the third shot was fired under such circumstances that if death had resulted therefrom it would have been murder, you are, in such event, instructed that you cannot find the defendant guilty of any higher grade of offense than assault with intent to murder, for the results of such fourth shot." Tr. of Rec., pp. 258. Bill of Exception No. 24.

Evidence on the Issue of Assault with Intent to Murder.

Brown testified that the third shot was the shot that killed the deceased, or at least that one of the first three shots killed the deceased. He further testified that the fourth shot was fired accidentally, and that before he fired the fourth shot Hermes was on the ground in a dying condition. See Tr. of Rec., pp. 195-204.

Doctors Giles and Heaney, as experts, testified that the fatal shot was fired while the deceased was in an erect position. Tr. of Rec., pp. 187-194.

Doctors Egbert and Lander, on behalf of the Government as experts, testified that the fourth shot was the fatal shot; therefore the issue was squarely made. Tr. of Rec., pp. —.

There was evidence showing that the first three shots fired by the defendant were fired in his necessary self-defense. Therefore the issue was squarely made. Tr. of Rec., pp. 131 and 214.

Three of the shots were superficial, and would not have caused the death of the deceased. See testimony of Egbert and Landers, Tr. of Rec., pp. 131 and 214.

There was, on behalf of the Government, evidence that the fourth shot was fired under circumstances that if it had caused the death of deceased, defendant would have been guilty of murder. See testimony of Wollschlaeger, Tr. of Rec., p. 128. If it resulted only in wounding deceased, not fatally, he would only be guilty of assault with intent to murder.

Authorities.

Stevenson vs. U. S. 162 U. S. 313, 40 L. Ed. 980.

Michie on Homicide, Vol. 2, Sec. 307, (2).

Gossett vs. State, 123 Ga., 51 S. E. 394.

Wells vs. Territory, 78 Pac. 124.

Wilson vs. Texas, 32 Tenn. 237.

Chappell vs. State, 47 Tenn. 92.

Maria vs. State, 28 Texas, 698-641.

Eighth.

This court erred in not holding that the evidence was insufficient to sustain the judgment of conviction.

Statement.

See all testimony introduced on trial. Tr. of Rec., pp. 100 to 227.

Premises Considered—Plaintiff in error prays that this, his Petition for Re-hearing be granted; that the judgment heretofore rendered against him in this cause on the 12th day of February, A. D. 1919, be set aside, and the judgment, decree and sentence of the District Court be reversed and dismissed, or at any rate the judgment be

reversed and remanded, and plaintiff in error prays for such proper relief under the record, in view of the errors, as he may be entitled to.

JAMES R. DOUGHERTY,
DOUGHERTY & DOUGHERTY,
G. R. SCOTT, BOONE AND POPE,
JAMES F. ODEM,
H. S. BONHAM,
Attorneys for Plaintiff in Error.

THE STATE OF TEXAS,
County of Bee:

I, James R. Dougherty, attorney for Robert B. Brown, plaintiff in error in the above numbered and styled cause, do hereby certify that in my opinion this petition for re-hearing is well founded and should be granted, and is not made for the purpose of delay.

JAMES R. DOUGHERTY,
Attorney for Plaintiff in Error.

Order Denying Rehearing.

Extract from the Minutes of April 7, 1919.

No. 3232.

ROBERT B. BROWN

versus

THE UNITED STATES OF AMERICA.

Ordered that the petition for rehearing filed in this cause, be, and the same is hereby, denied.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 311 to 352 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3232, wherein Robert B. Brown is plaintiff in error, and the United States of America is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 310 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 21st day of April, A. D. 1919.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,

Clerk of the United States

Circuit Court of Appeals.



354 In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3232.

ROBERT B. BROWN, Plaintiff in Error,

versus

THE UNITED STATES OF AMERICA, Defendant in Error.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case, heretofore certified by me for filing in the Supreme Court of the United States, was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I now hereby certify that on the 30th day of July, A. D. 1919, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:—

"In the Supreme Court of the United States, October Term, 1919.

No. 364.

ROBERT B. BROWN, Petitioner,

v.

THE UNITED STATES.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Fifth Circuit to the writ of certiorari granted therein.

(Signed)

W. E. POPE,
JAMES R. DOUGHERTY,
E. C. BRANDENBURG,
Counsel for Petitioner.

(Signed)

ALEX C. KING,
Solicitor General."

July 10, 1919.

355 I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 30th day of July, A. D. 1919.

[Seal, United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
*Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.*

356 UNITED STATES OF AMERICA ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Robert B. Brown is plaintiff in error, and The United States of America is defendant in error, No. 3232, which suit was removed into the said Circuit Court of Appeals by virtue of in error to the District Court of the United States for the Southern District of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the seventeenth day of June, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

358 [Endorsed:] File No. 27,105. Supreme Court of the United States, No. 1019, October Term, 1918. Robert B. Brown vs. The United States of America. Writ of Certiorari. Filed 26 day of June, 1919. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

359 [Endorsed:] No. 3232. United States Circuit Court of Appeals for the Fifth Circuit. Robert B. Brown, Plaintiff in Error, vs. The United States of America, Defendant in Error. Return to Writ of Certiorari.

360 [Endorsed:] File No. 27,105. Supreme Court U. S. October Term, 1919. Term No. 364. Robert B. Brown, Petitioner, vs. The United States. Writ of certiorari and return. Filed August 2, 1919.

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PUBLISHED WEEKLY
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THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION
PUBLISHED WEEKLY
CHICAGO, ILL., MAY 1, 1919
Vol. 34, No. 19

in this cause, and also files herewith necessary printed copies of said record, and a brief and argument in support of this motion, and makes, as required by the rules, the following:

**SUMMARY AND SHORT STATEMENT OF THE MATTERS
INVOLVED AND THE REASONS RELIED UPON
FOR WRIT OF CERTIORARI.**

I.

This is a criminal case, wherein petitioner is prosecuted by indictment, charging him with the offense of murder, alleged to have been committed on property conveyed to the United States for its public purposes. He was found guilty of murder in the second degree, and sentenced to fifteen years imprisonment.

II.

The government asserted jurisdiction on the ground that the offense was committed on lands acquired by it in the town of Beeville, Bee County, Texas, for its public purposes. The indictment did not allege the character of the public purposes for which the property was acquired. In other words, it did not charge that the property was acquired for the purpose of the erection of a fort, magazine, arsenal, dock-yard or other needful building, but alleged broadly that the property was acquired for "the public purposes of the United States."

III.

Petitioner, by appropriate pleading, contended that the indictment did not charge an offense within the territorial jurisdiction of the United States, or an offense against the

United States, since it did not charge that the place where the offense was committed was purchased or otherwise acquired by the United States, with the consent of the Legislature of the State for the purpose of the erection of "a needful building."

IV.

Petitioner seasonably filed his motion to quash the indictment, and after conviction his motion in arrest of judgment, raising by both motions the question of the jurisdiction of the United States Court, and the sufficiency of the indictment. The motions were overruled, and exceptions preserved.

The Circuit Court of Appeals held that it could take judicial notice that the United States had acquired the property for the purpose of a needful building.

V.

Petitioner was tried and convicted.

(a): Of a crime which did not appear from the indictment to be within the jurisdiction of the United States, and

(b): Of an act which was not an offense against the laws of the United States.

The Circuit Court of Appeals held the indictment sufficient, and that the trial court did not err in overruling the motions. This ruling is assigned as error.

VI.

The trial court instructed the jury, over petitioner's objection, that petitioner, though in a place where he had a right to be, and though the deceased was making a felonious as-

In The Supreme Court Of The United States

..... TERM, 1919.

No.....

ROBERT B. BROWN, PETITIONER,

VS.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR CERTIORARI

To the Honorable Supreme Court of the United States:

Robert B. Brown, a citizen of the State of Texas, having his residence in Bee County, Texas, hereinafter styled petitioner, complaining of the United States of America, hereinafter styled respondent, submits this his Application for Writ of Certiorari, to review a decision of the Honorable Circuit Court of Appeals for the Fifth Circuit, entered on the 12th day of February, A. D. 1919, in Cause No. 3232, styled Robert B. Brown, plaintiff in error, vs. The United States of America, Defendant in Error, and files herewith as an Exhibit to his petition, a certified copy of the entire transcript of the record

sault upon him, with intent to kill him, was obliged to retreat, though without any fault upon his part, before he could exercise his right of self-defense, and oppose force with force, and slay his assailant.

To this charge petitioner excepted.

Special charges were requested by defendant petitioner, and refused by the court, instructing the jury that if petitioner was where he had a right to be, and was without fault on his part, and was unlawfully assaulted by deceased, with the intent to kill him, the petitioner, then the latter should stand his ground, and was not required to retreat, but could resist force with force to the extent even of slaying his assailant so feloniously assaulting him.

Exception was preserved by petitioner to the refusal of the court to submit the charge.

VII.

There was an issue of fact, made by the evidence that the homicide was committed by petitioner at a time when, without fault on his part, he was being feloniously assaulted by the deceased with the intent and purpose to kill petitioner.

VIII.

The Circuit Court of Appeals, in holding that the defendant was bound to retreat, though feloniously assaulted and in danger of death therefrom, before he could exercise his right of self-defense, we submit was mistakenly controlled by the case of *Allen vs. United States*, 164 U. S. pp.492-497. It should have followed the case of *Rowe vs. United States*, 164

U. S. pp. 546-558, and the rules governing the subject as declared at the early common law.

The rule at the early common law was that the duty to retreat was not imposed in cases of justifiable homicide or justifiable self-defense, but only in cases of excusable homicide, or excusable self-defense was one who was feloniously assaulted compelled to retreat before he could resist force with force and slay his assailant. The early common law must be looked to to supply the missing elements or ingredients of murder or of defenses to murder under the laws of the United States, where no statute is declaratory thereof.

IX.

There was evidence in the case that petitioner, if guilty at all, was guilty of no higher grade of offense than assault with intent to kill. This phase of the case was not submitted to the jury by the trial court, though appropriate charges were requested thereon, and defendant excepted to the failure of the court to submit this issue.

All of these rulings of the trial court were affirmed by the Circuit Court of Appeals, and the error of both courts is complained of here.

X.

Your petitioner avers that the present case is one in which it is proper to issue a writ of certiorari for the reasons:

(a): The Circuit Court of Appeals, by its decision affirming the judgment of the lower court, holds in effect as a matter of law that the United States Courts has jurisdiction

over territory acquired by the United States for any public purposes, regardless of whether or not such purpose is one for which the constitution of the United States authorizes the acquisition of territory and cession of jurisdiction by the states.

(b): Because the Circuit Court of Appeals holds as a matter of law in effect that an indictment need not charge that the homicide was committed on territory ceded for one of the particular purposes for which cession of jurisdiction by the states of their territory is permitted by the Constitution of the United States, though such locality is an element of the offense by the terms of Art. 272 of the Judicial Code, defining murder.

(c): Because the Circuit Court of Appeals erred in holding that in the absence of these jurisdictional averments in the indictment, it could take judicial notice that the property had been acquired by the United States for the purpose of a needful building, and jurisdiction had been ceded for such purposes.

(d): The Circuit Court of Appeals, by its holding that petitioner was obliged to retreat before he could exercise his right of self-defense against the felonious assault of one endeavoring to murder him, erroneously declared the substantive law of the United States, and the early common law of England as imposing the duty of retreat upon one who without fault is assaulted feloniously by another with intent to kill. In so holding they mistakenly followed the case of Allen

vs. United States, 164 U. S. pp. 492-497, which had no application to the facts and should have been controlled by the principle announced in the case of Rowe vs. United States, 164 U. S., pp. 546-558 and the Beard case 158 U. S., p. 550.

(e): The defendant had a right to have every defensive issue submitted to the jury, and the failure to submit to the jury the issue of assault with intent to kill, was a denial of the right of trial by jury.

The questions here involved are of sufficient general and material importance and intent as to make necessary that they should be determined by the court of last resort.

XI.

In the brief and argument of petitioner, filed herewith, the issue and evidence supporting petitioner's claim are pointed out more fully than in this motion, and said brief is referred to in aid hereof.

XII.

Respondent is represented by the Hon. D. E. Simmons, of Houston, Harris County, Texas, United States District Attorney for the Southern District of Texas.

Wherefore, petitioner prays that this petition for certiorari be granted, and that this court proceed as is required by law and the rules of this court in such case, and upon final hearing the judgment of the trial court and the Circuit Court of Appeals be reversed, and the cause dismissed, or remanded with proper instructions.

..... W. E. Roper J. J. [Signature]
Attorneys for petitioner.

I, James R. Long, of counsel for petitioners, named in the foregoing petition, solemnly swear that I have read the foregoing petition, and that the facts therein set forth are true to the best of my knowledge, information and belief. My knowledge is derived from the record in this case, and from what has taken place in my presence and hearing in the court in which this action has been heard.

James R. Long.....

Subscribed and sworn to before me this 5th day of May, A. D. 1919.

J. H. Robinson.....

Notary Public in and for Bee Co. Tex.

W. E. Pope.....

I, W. E. Pope....., attorney and counselor at law, hereby certify that I have examined the foregoing petition for writ of certiorari, that the same is not made for the purpose of delay, and that in my opinion said petition is meritorious and well founded in law, and ought to be granted and the writ issued.

W. E. Pope.....

Of Counsel for Petitioner.

No.....

IN THE SUPREME COURT OF THE UNITED STATES,

..... TERM, 1919.

ROBERT B. BROWN, PETITIONER,

VS.

THE UNITED STATES OF AMERICA, RESPONDENT.

Comes now Robert B. Brown, by W. E. Pope and James R. Dougherty, of counsel, and moves this Honorable Court that they shall, by certiorari or other proper process to the Honorable, the Judges of the Circuit Court of Appeals for the Fifth Circuit, require said Court to certify to this Honorable Court for its review and determination, a certain cause in said Circuit Court of Appeals lately pending, wherein your petitioner was plaintiff in error and the United States of America was defendant in error, No. 3232, and to that end they now tender herewith their argument and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

..... W. E. Pope
 James R. Dougherty

Attorneys for Petitioner.

G. R. Scott, Boone and Pope,
 Dougherty & Dougherty,
 H. S. Bonham,
 J. F. Odem,
 Of Counsel.



In The Supreme Court Of The United States

..... TERM, 1919.

No.

ROBERT R. BROWN, PETITIONER,

VS.

THE UNITED STATES OF AMERICA, RESPONDENT.

—
**BRIEF AND ARGUMENT IN SUPPORT OF PETITION
FOR CERTIORARI.**
—

James R. Dougherty,
of Beaville, Texas.
W. E. Pope,
of Corpus Christi, Texas.
Attorneys for Petitioner.

G. R. SCOTT, BOONE & POPE,
DOUGHERTY & DOUGHERTY,
H. A. BOWMAN,
J. F. ODELL,
of Counsel.

*In The Supreme Court
Of The United States*

..... TERM, 1919.

No.....

ROBERT B. BROWN, PETITIONER,

VS.

THE UNITED STATES OF AMERICA, RESPONDENT.

**BRIEF AND ARGUMENT IN SUPPORT OF PETITION
FOR CERTIORARI**

To the Honorable Supreme Court of the United States:

Your petitioner, Robert B. Brown, would respectfully show that he has this day filed his application for writ of certiorari to review the decision of the Honorable Circuit Court of Appeals for the Fifth Circuit entered on the 12th day of February, A. D. 1919, in Cause No. 3232, styled Robert B. Brown, plaintiff in error vs. The United States of America, Defendant in error, and in support of same respectfully submits the following:

BRIEF AND ARGUMENT.

The questions involved and authorities upon which peti-

tioner relies for the granting of said writ of certiorari are:

QUESTIONS INVOLVED:

The United States Circuit Court of Appeals erred in holding that the indictment charged an offense against the laws of the United States, or within the jurisdiction of its courts.

The indictment, which was brought under Sec. 272 of the Judicial Code, did not allege that the homicide occurred on lands acquired by the United States by consent of the Legislature of the State for the erection of a fort, magazine, arsenal, dock-yard or other needful building—but merely alleged that it occurred on lands acquired by the United States "for its public purposes," and over which it had exclusive jurisdiction.

We submit that the indictment did not charge an offense within the territorial jurisdiction of the United States, or any offense against the United States punishable by the laws of the United States.

The indictment is set out in full, Tr. of Rec., pp. 330-334.

Section 272, under which petitioner was prosecuted, is as follows:

"The crimes and offenses defined in this chapter shall be punished as herein prescribed. * * *

"Third: When committed * * * within or on any place purchased or otherwise acquired by the United States by consent of the Legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dock-yard or other needful building."

The power of Congress to legislate concerning the places mentioned in Sec. 272 is derived from Art. 1, Sec. 8, Clause 17: "The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever over all places purchased by the consent of the Legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

Since the indictment does not declare that the property was acquired, or jurisdiction ceded for the purpose of the erection of any needful building, which would confer jurisdiction under the constitution, the absence of territorial or areal jurisdiction is apparent on the face of the indictment.

Again, since there is no charge that the homicide occurred on a place acquired by the United States for the erection of a fort * * * or other needful building, there is no provision under Sec. 272 for the punishment of the offense, and the indictment does not charge murder under such article, for the Statute, Sec. 272, is specific in declaring that the offenses described in the Chapter are punishable only when committed on places acquired for the erection of a needful building.

This exact question has never been before this court, but we submit generally:

(a): That the territorial jurisdiction of the Federal courts must appear on the face of the indictment, and

(b): That all the essential elements, descriptive of statutory crimes, must be set out in the indictment.

The absence of these allegations can not be cured by in-

tendment or judicial notice. In *U. S. vs. Davis*, 5 Mason, 536; Fed. Cas. No. 14730, p. 783, where it was said that the court might take judicial notice of a statute ceding jurisdiction of a place for a Marine Hospital in Chelsea, Justice Storey, on circuit, said:

"We cannot judicially know that the place described in the indictment was purchased under the authority of that statute."

"It should not be left in doubt, or to mere inference from the words of the indictment whether the offense charged was within Federal cognizance." *Blitz vs. U. S.* 38 Law, Ed. p. 727.

"There must be an affirmation and distinct charge in the indictment. It is a familiar rule of criminal pleading and practice that nothing is taken by intendment. The facts must be charged and charged distinctly." Justice Brewer in *U. S. vs. Morrissey*, 32 Fed. 151.

In *Early vs. Commonwealth*, 24 S. E. 936 (Ga.) the indictment averred the offense was committed "within the jurisdiction of the court." The Supreme Court of Georgia passing on the sufficiency of the allegations said: "Jurisdiction is said to be a matter of law, the place where the crime was committed a matter of fact. It is necessary to aver and prove the place where the crime was committed. It is not sufficient to aver as is done in this indictment that the offense was committed 'within the jurisdiction of the court,' which is a conclusion of law, but the indictment should have stated

the facts, which gave the court jurisdiction. The demurrer to the indictment should have been sustained."

An allegation in an indictment that the crime "was committed within the jurisdiction of the court" is not an averment of fact, but a mere statement of a conclusion of law. *State vs. Carlson*, 62 Pac. Rep. 1019; *Johnson vs. State*, 58 S. E. Rep. 265.

"The crime must be charged with precision and certainty, and any ingredient of which it is composed must be accurately and clearly alleged. To this end facts must be stated, not conclusions of law." *Martin vs. U. S.* 168 Fed. 205 (C. C. A.)

In *U. S. vs. Lewis*, 36 Fed. p. 446 defendant was charged under Art. 5346 R. S. with the offense of an assault on the high seas. It was not alleged that the offense occurred on board of an American vessel. Held, "To constitute a crime against the United States of which this court has jurisdiction, the assault must have taken place on board of an American vessel, and that fact must be alleged in the pleading."

"It seems to be necessary under the act to aver in the indictment, and prove upon the trial, that the place where the crime was committed is within the descriptive terms of the statute." *Franklin vs. U. S.* 1, Colorado, 35.

"In absence of averment that offense occurred in Indian country, the court could not take jurisdiction." *Id.*

"The places over which exclusive jurisdiction is granted are those which have been purchased by the United States for the purposes specified in the Constitution. • • • • •"

"The Constitution clearly implies the permanent use of the property purchased for the construction or erection of some of the structures designated or some other needful building. The right of exclusive jurisdiction can be acquired only by the United States in the mode pointed out by the constitution * * * * * where the lands were purchased by the United States by the consent of the State **for one of the specific and enumerated objects.**" U. S. vs. Tierney, 28 Fed. Cas. 16517.

"It is not competent for the Legislature to abdicate its jurisdiction over its territory, except where the lands are purchased by the United States for the specific purpose contemplated by the Constitution. The rule that legislative consent operates as a complete cession is applicable only to objects which are specified in the above provisions. In re Kelly 71 Fed. 545, Clay vs. State, 4 Kansas 47, People ex rel, Jones vs. Strassheim, 81 N. E. Rep. 1130.

In U. S. vs. Hopkins, Fed. Cas. No. 15,387-A, the facts were that the State of Georgia had ceded jurisdiction to the United States only in places purchased by the United States for forts or fortification: (Syllabus by the court). "The Federal Court had no jurisdiction over land purchased and used for purposes of an arsenal."

"The consent of the states to the purchase of lands within them for the special purpose named is, however, essential under the Constitution to the transfer to the general government with the title of political jurisdiction." Id.

The United States Circuit Court of Appeals erred in hold-

ing that the trial court did not err in instructing the jury that plaintiff in error, though in a place where he had a right to be, viz—on his employer's premises, and though the deceased was making a felonious assault upon him, with intent to kill him, or do him some serious bodily injury, was obliged to retreat, though without fault on his part, to the ditch or wall before he could exercise his right of self defense, and slay the deceased.

In the decision of the Circuit Court of Appeals, it is declared——

(a): "The defendant was rightfully where he was at the time of the quarrel, **but was not on his own premises.**"

(b): "A tendency of the evidence was to the effect that the deceased, Hermes, approached defendant, an open knife in his hands, with which he attempted to strike defendant. The evidence, without conflict, showed that defendant on the approach of Hermes, retreated twenty or twenty-five feet to where he had left his rain-coat, in which was his pistol, and after obtaining his pistol from it, stood his ground, using his pistol with fatal effect."

See opinion of Circuit Court of Appeals, Tr. of Rec. pp. 321-322. The trial court charged the jury that it was the duty of defendant to retreat before he could resist force with force. Tr. of Rec., pp. 236 to 238.

Paragraph 10 of the main charge was as follows:

"Under the plea of not guilty, the defendant is entitled to show, if he can by the evidence, that the homicide was

committed in the lawful defense of himself, but it is necessary to remember in considering the question of self-defense, that the party assaulted is **always under the obligation to retreat**, so long as retreat is open to him, provided he can do so without subjecting himself to the danger of death or great bodily harm."

By Paragraph 11 to 15 of the main charge, inclusive, the court reiterated to the jury that the obligation rested upon defendant to retreat notwithstanding he was feloniously assaulted before he could exercise his right of self-defense. The defendant excepted to these charges.

Appropriate charges were requested by defendant, instructing the jury that if defendant was feloniously assaulted, while at a place where he had a right to be, without fault upon his part, he had a right to stand his ground and resist force with force to the extent of slaying his assailant. These charges were refused. To this action of the court defendant excepted. Charge No. 9, requested by defendant, and refused. Tr. of Rec. pp. 252-253.

These rulings were affirmed by the Circuit Court of Appeals.

The Circuit Court of Appeals relies upon the decision in *Allen vs. United States*, 164 U. S., p. 492. We submit that the decision in that case is not applicable to this case.

The Circuit Court of Appeals denied the right of petitioner to stand his ground, though in the right, on the sole ground that he was not on his own premises. We submit that this

rule is not in accord with reason, and is not in accord with the law on the subject.

In determining whether defendant was compelled to retreat to the wall, before he could exercise his right of self-defense and kill his assailant, who was making a felonious assault upon him with a knife, resort must necessarily be had to the decisions of this court as also to the early common law of England, as this duty to retreat is not declared by the Federal law as an element of self-defense, and exists, if at all, as a part of the early common law, to which the Federal courts resort to ascertain the elements of any crime not declared by statute. We may, therefore, look to the early English authors and statutes to ascertain what the common law of England was at the time of the American Revolution on this subject.

The decisions of the states are in hopeless conflict. Some of the states have developed as their own common law "the rule of flight." The majority of the states however follow the rule of the early common law of England of "stand ground when in the right."

We submit that this court will not follow the common law of the states, but of England in determining the elements of the right of self-defense.

DUTY TO RETREAT—IT DID NOT EXIST IN CASES OF JUSTIFIABLE HOMICIDE OR JUSTIFIABLE SELF-

DEFENSE AT THE COMMON LAW.

There is direct conflict in the decisions of the states on the subject. The cases are divided into two classes, those which

hold to what is termed the "fight rule," and the others to what is termed "stand ground when in the right rule."

The early common law has always been recognized by the United States courts as a part of the body of the criminal law of our government insofar as resort must be had to it to supply any failure upon the part of the statutes in defining the ingredients of an offense or the elements that must enter into it in order to make an act criminal.

In the case of *United States vs. Palmer et al*, 3 Wheaton, p. 613, the second question presented to the court was whether the crime of robbery mentioned in the eighth section of the Act of Congress is the crime of robbery, as recognized and defined at the common law. Replying to this question, Chief Justice Marshall said: "The second question proposed in this case is one on which I presume there can be no doubt, for the definition of robbery under this act we must look for the definition of the terms in the common law."

In the case of *United States vs. Smith*, 5 Wheaton, p. 160, Mr. Justice Storey said:

"When the act of 1790 declares, that any person who shall commit the crime of robbery, or murder, on the high seas, shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definition of these terms as they are found in our treaties of the common law. In fact, by such a reference, the definitions are necessarily included, much as if they stood in the text of the act. In respect to murder, where "malice aforethought" is of the essence of the

offense, even if the common law definition were quoted, in express terms, we should still be driven to deny that the definition was perfect, since the meaning of "malice aforethought" would remain to be gathered from the common law. There would then be no end to our difficulties, or our definitions, for each would involve some terms which might still require some new explanation."

Again in *Pettibone vs. United States*, 148 U. S. 203, Mr. Chief Justice Fuller said:

"The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws or treaties of the United States, but they resort to the common law for the definition of terms by which offenses are designated."

The common law referred to is the law of England as it existed prior to the American Revolution. See 12 *Corpus Juris*, p. 198, declaring that English decisions rendered prior to the Revolution are usually considered conclusive evidence of what the common law is. In the same paragraph, the writer declares that the early standard works on the subject of the common law are strong evidence of what it was.

We assert that the early common law, as declared by all of the standard authors on criminal law, is identical with what is termed the "stand ground when in the right rule."

THE EARLY COMMON LAW.

(1): A person who was feloniously assaulted, and not himself in fault, could exercise his right of self-defense with-

out the necessity of retreating to the wall whenever he was at a place where he had a right to be.

(2): If the assault was not felonious, or the difficulty arose in an affray or sudden encounter, and in the course thereof, it became necessary for the slayer to kill his assailant, then before he would be justified in doing so, he must retreat to the wall.

In short, it was the difference between justifiable self-defense and excusable self-defense, corrolaries respectively of "justifiable homicide," and "excusable homicide."

It seems to us that the confusion or rather the conflict in decisions as to whether or not, at the early common law, one who was feloniously assaulted by another was compelled to retreat, before he could exercise his right of self-defense, is due to the fact that this distinction between excusable or justifiable homicide has never been, or at least in but few cases, clearly recognized. The clearest distinction between these two grades of homicide is made in third American edition of Russel on Crimes, page 508 et seq.

It is very clear from the text of this work that the duty to retreat was only imposed in the case of excusable homicide, and never in the case of justifiable homicide. It must be noted too, that the author cites in support of the text, Hale, East, Foster et al. In justifiable homicide, this duty of retreat was not imposed upon a party assaulted feloniously by another in an effort to commit a known felony upon him, such as murder, robbery, rape, arson and the like. Excusable homicide was

divided into two sorts, either *per infortunium*, by misadventure, or *se et sua defendendo*. We are not concerned with the first sort. The last sort or subdivision has been mistakenly treated as homicide in true self-defense, due, no doubt to a literal translation of the Latin phrase. As a matter of fact excusable homicide *se et sua defendendo* was not homicide in true or perfect self-defense, at the common law, but was homicide in a chance medley or sudden encounter where an element of blame attached to the slayer and according to Lord Coke, under such circumstances at the common law, the defendant would have suffered death, but under the statute of Gloucester he was pardoned at the forfeit of his goods and chattels.

In all cases of excusable homicide, the slayer was assaulted suddenly, but not feloniously, or the necessity for the homicide arose in an affray or sudden encounter, in which the slayer was not an entirely unwilling participant, therefore not entirely blameless. The common law required that the person under such circumstances who killed another in his own self-defense (*se et sua defendendo*) should have retreated as far as he could conveniently to avoid the violence of the assault before he turned upon his assailant.

A wise provision, for the assaulted party was not entirely blameless—this principle is yet incorporated in the laws of all the states, in the general rule, that in mutual altercations there must be abandonment by the slayer of the difficulty before his right to kill in self-defense arises.

In the case of justifiable homicide, however, the rule was entirely different.

There are several phases of justifiable homicide, such as homicide by execution, homicide by officers killing in the course of arrests, officers dispersing mobs in cases of riots, etc., and the class of homicides with which we have to deal, which was termed, by Russel, homicide in the prevention of any forcible and atrocious crime. This class is placed by him on the same basis of freedom from blame as the first three. The rule laid down (Russell on Crimes, 3rd American Ed., at page 519) on the right to defend one's person against violence is stated as follows:

"A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends and endeavors, by violence, or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable. But it has been holden, that this rule does not apply to any crime unaccompanied with force, as picking of pockets. It seems, therefore, that the intent to murder, ravish, or commit other felonies attended with force or surprise, should be apparent, and not left in doubt; so that if A makes an attack upon B, it must plainly appear by the circumstances of the case (as the manner of the assault, the weapon, etc.) that the life of B is in imminent danger, other-

wise his killing the assailant will not be justifiable self-defense."

"Excusable homicide is of two sorts; either *per infortunium*, by misadventure; or *se et sua defendendo*, upon a principle of self-defense. The term excusable homicide imports some fault in the party by whom it has been committed, but of a nature so trivial that the law excuses such homicide from the guilt of felony, though in strictness it deems it to be deserving of some degree of punishment. It appears to be the better opinion, that the punishment inflicted for this offense was never greater than a forfeiture of the goods and chattels of the delinquent, or a portion of them; and, from as early a time as our records will reach, a pardon and writ of restitution of the goods and chattels have been granted as a matter of right, upon payment of the expenses of suing them out.

"Excusable homicide in self-defense is a sort of homicide committed *se et sua defendendo*, in defense of a man's person or property, upon some sudden affray, considered by the law as in some measure blameable, and barely excusable." *Id.* 519 et seq.

"When a man is assaulted in the course of a sudden brawl or quarrel, he may, in some cases, protect himself by killing the person who assaults him, and excuse himself on the ground of self-defense. But, in order to entitle himself to this plea, he must make it appear, first, that before a mortal stroke given he had declined any further combat; secondly, that he then killed his adversary through mere necessity, in order to avoid

immediate death. Under such circumstances, the killing will be excusable self-defense, sometimes expressed in the law by the word *chance medley* (and it has been written by some *chaud medley*), the former of which in its etymology, signifies a casual affray; the latter an affray in the heat of blood, or passion. Both of them are pretty much of the same import; but the former has, in common speeches, been often erroneously applied to any manner of homicide, whereas it appears by one of the statutes, and the ancient books, that it is properly applied to such killing as happens in self-defense upon a sudden encounter."

"Homicide upon chance medley borders very nearly upon man-slaughter, and, in fact and experience, the boundaries are in some instances scarcely perceivable, though in consideration of law they have been fixed. In both cases it is supposed that passion had kindled on each side, and blows have passed between the parties; but in the case of man-slaughter, it is either presumed that the combat on both sides had continued to the time the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death. And the true criterion between them is stated to be this: When both parties are actually combating at the time the mortal stroke is given, the slayer is guilty of man-slaughter; but if the slayer has not begun to fight, or having begun endeavors to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defense."

"In all cases of homicide excusable by self-defense, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or with malice; and from the doctrine which has been above laid down, it appears that the law requires, that the person who kills another in his own defense should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood (1 Russell on Crimes, 3rd American Ed., pp. 508-515).

JUSTIFIABLE HOMICIDE.

In Section 3, Subject—Justifiable Homicide, page 516-521, 1 Russell on Crimes, 3rd American Ed.:

"It has been clearly stated that justifiable homicide is of several kinds, as it may be occasioned by the performance of acts of unavoidable necessity, or by acts done by the performance of the law." P. 516.

"A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable."

"And the rule clearly extends only to cases of felony, for if one comes to beat another, or to take his goods merely as a

trespasser though the owner may justify the beating of him, so far as to make him desist, yet if he kills him, it is man-slaughter. But if a house be broken open, though in the day-time, with a felonious intent, it will be within the rule."

* * * * *

"The rule in the case of justifiable self-defense, according to Foster (see *Fost. C. L. 273*), does not require retreat by a party feloniously assaulted. The author says:

"In the case of justifiable self-defense the injured party may repel force by force in defense of his person, habitation, or property against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable."

Lord Coke (3 Institutes, page 55), speaking of a case of a common assault of A upon B in a mutual combat, says: "If in the course of such fighting together A giveth back until he cometh to a hedge, wall, or other strait beyond which he can not pass, and then, in his own defense and for safeguard of his own life, killeth the other; this is voluntary, and yet no felony, and the jury that finds that was *se defendendo*, ought to find the special matter. And yet such a precious regard the law hath of the life of man, that the case be inevitable, that, at the common law, he should have suffered death, and, though the statute of Gloucester save his life, yet he shall forfeit all

his goods and chattels." The author then makes the same distinction in regard to retreat in justifiable self-defense contended for by petitioner herein, saying:

"Some, without giving back to a wall, etc., or other inevitable case, as if a thief offer to rob or murder B either abroad or in his house, and thereupon assault him, **and B defends himself without giving back**, and in defense killeth the thief, this is no felony." Cokes 3 Institutes, p. 56

"Regularly it is necessary that the person that kills another in his own defense fly as far as he may to avoid the violence of the assault before he turn upon his assailant * * * * but this has some exceptions.

"One in respect of the person killing, second in respect to the person killed. If a thief assaults a true man, either abroad or in his house to rob or kill him, the true man is not bound to give back, but may kill his assailant, and it is not felony." Hales Pleas of the Crown Chap. 40.

It must be noted, as said by Mr. Russell in his work with respect to the statute of Henry 8, Chap. 5, that this illustration of the principle is not exclusive of other instances of justifiable homicide, but rather illustrative of the fact that where a felonious assault is made abroad upon B with the intent of murdering him, not solely for the purpose of theft, but out of any wanton malice aforethought, B's right to stand his ground and kill his assailant was conferred by the law, and such killing was not felony, and the slayer forfeited nothing.

In Foster's Crown cases, C. 3, p. 273 et seq., published in

1762, the rule is thus stated:

“The writers on the common law, who, I think, have not treated the subject of self-defense with due precision, do not, in terms, make the distinction I am aiming at; **yet all agree that there are cases in which the man may, without retreating, oppose force to force, even to the death. This I call justifiable self-defense. They, justifiable homicide.** They likewise agree that there are cases in which the defendant can not avail himself of the plea of self-defense without showing that he retreated as far as he could with safety; and then, merely for the preservation of his own life, killed the assailant. **This I call self-defense, culpable, but, through the benignity of the law, excusable.** In the case of justifiable self-defense, the injured party may repel force with force in defense of his person, habitation or property against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit a known felony upon either. **In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable.**”

Mr. East, in his *Treaties on the Pleas of the Crown*, (published in 1803), at page 271, says, in speaking of homicide from necessity, makes the clear distinction in terms:

“Herein may be considered, 1—What sort of attack it is lawful and justifiable to resist, even by the death of the assailant, and where the party is without blame. 2—Where such killing is only excusable, or even culpable, and the party is not

free from blame, etc."

In relation to the first sort, the author says: "1—A man may repel force with force, in defense of his person, habitation or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. **In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kills him in so doing, it is called justifiable self-defense.**"

In Hawkin's Pleas of the Crown, 7 Ed. Vol. 1, the author in speaking of justifiable homicide, at page 172 says:

"Of justifiable homicide of a private nature, in the just defense of a man's person, house or goods, I shall show, first, in what cases the killing of a wrong-doer may be justified by reason of such defense. Secondly, where the killing of an innocent person may be so justified.

"Sect. 21. And first, the killing of a wrong-doer, in the making of such defense, may be justified in many cases; as where a man kills one who assaults him in the highway to rob or murder him; or the owner of a house, or any of his servants or lodgers, etc., kill one who attempts to burn it, or to commit in it murder, robbery or other felony (a): or a woman kills one who attempts to ravish her (1) or a servant coming suddenly and finding his master robbed and slain, falls upon the murderer immediately and kills him; for he does it in the height of his surprise, and under just apprehension of the like

attempt upon himself; but in other circumstances he could not have justified the killing of such an one, but ought to have apprehended him, &c.

“Sect. 24: And I can see no reason why a person who without provocation is assaulted by another in any place whatsoever, in such a manner as plainly shows an intent to murder him, as by discharging a pistol, or pushing him with a drawn sword, etc., may not justify killing such an assailant, as much as if he had attempted to rob him; for is not he who attempts to murder more injurious than he who barely attempts to rob me? And can it be more justifiable to fight for my goods than for my life? And it is not only highly agreeable to reason that a man in such circumstances may lawfully kill another, **but it seems also to be confirmed by the general tenor of our law books;** which, speaking of homicide *se defendendo*, suppose it is done in some quarrel or affray. From whence it seems reasonable to conclude, that where the law judges a man guilty of homicide *se defendendo* there must be some precedent quarrel in which both parties always are, or at least may justly be supposed to have been, in some fault, so that the necessity to which a man is at length reduced to kill another, is in some measure presumed to have been owing to himself; for it cannot be imagined that the law, which is founded on the highest reason, will adjudge a man to forfeit all his goods, and put him to the necessity of purchasing his pardon, without some appearance of a fault. And though it may be said that there is none in chance-medley, and yet that the party's goods

are also forfeited by that, I answer, that chance-medley may be intended to proceed from some negligence, or at least want of sufficient caution in the party who is so unfortunate as to commit it, so that he doth not seem to be altogether faultless. Besides, one of the reasons given in our law-books for which homicide *se defendendo* forfeits goods, is because thereby a true man is killed; but it seems absurd, that he who apparently attempts to murder another, which is the most heinous of all felonies, should be esteemed such, when those who attempt other felonies, which seem to be much less criminal, are allowed to be killed as downright villians, not deserving the protection or regard of the law."

"And by 24 Hen 8, c. 5 it is recited, "forasmuch as it hath been in question and ambiguity, that if any evil-disposed person or persons do attempt feloniously to rob or murder any person or persons in or nigh any common highway, cartway, horse-way, or footway, or in their mansions, messuages, or dwelling places; or that feloniously do attempt to break open any dwelling-house in the night-time; should happen, in the prosecution of such felonious intent, to be slain by him or them whom the said evil-doers should so attempt to rob or murder, or by any person or persons being in their dwelling-house, which the same evil-doers should so attempt burglarily to break by night, if the said person so happening in such cases to slay the offender so attempting to commit murder or burglary should forfeit or lose his goods or chattels for the same, as any other person should do that by chance medley should

happen to kill another in his or their defense." For the declaration of which ambiguity and doubt it is enacted; "That whoever shall be indicted or appealed of or for the death of such evil-disposed person or persons attempting to murder, rob, or burglarily to break mansion-houses as aforesaid, shall not forfeit any lands, tenements goods or chattels, but shall be thereof, and for the same, fully acquitted and discharged."

Bishop, at Section 850, in his *New Criminal Law* (1892) distinguishes the case where retreat to the wall is required, saying:

"3: Retreating 'to the wall.'—These cases of mere assault, and cases of mutual quarrel, where the attacking party has not the purpose of murder in his heart, are those to which is applied the doctrine of the books that one cannot justify the killing of another, though apparently in self-defense, unless he retreated 'to the wall,' or other interposing obstacle before resorting to this extreme right. But——

"4: Murder Meant—Deadly Weapon. Where an attack is made with murderous intent, there being a sufficient overt act, the person attacked is under no duty to fly; he may stand his ground, and if need be kill his adversary. And it is the same where the attack is with a deadly weapon; for in this case the person attacked may well assume that the other intends murder, whether he does in fact or not.

Under paragraph Three the author cites Hale's P. C. 479, 481; 4 Bl. Com. 185; under paragraph four, 3 Coke's Institute, 55-56; Foster, 273; 1 East P. C., 271.

At Section 951, Mr. Bishop declares that not only does one have the right to resist a murderous assault, but it is his duty to do so, and if he flies he commits substantially the offense of misprision of felony.

"2. Law of Misprision—When one witnesses an attempt to commit a felony, the duty comes to him immediately to resist it; inasmuch that as we have seen, if he merely declines this duty, he is guilty of an indictable misdemeanor, called misprision of felony. Therefore if a man murderously attacked by another flies instead of resisting, he commits substantially this offense of misprision of felony; even though we should admit that in strict law he will be excused because acting from the commendable motive of saving life. While, on the other hand, if he flies from one intending merely a battery, he is in no way amenable either to the letter or spirit of a broken law."

Out of this duty to resist a felony arose the doctrine that one had the right to stand his ground against a murderous assault according to many authorities.

From the foregoing it would seem that the early law writers on the subject are all in accord. We will now consider the decisions of this court.

In the case of *Beard vs. United States*, 158 U. S. 550, the Supreme Court in effect declared that the rule contended for herein was correct, and that the defendant did not have to retreat, when assaulted feloniously. This is apparent from the reasoning of the court throughout the decision.

In that case this court reviewed both the theory of retreat and of standing ground, and discussed at length and approved the Erwin case, 29th Ohio State, 186, in which the Supreme Court of Ohio reversed the judgment of the trial court, because it charged that it was the duty of the defendant to retreat. In the course of his opinion Justice Harlan said:

“Upon a full review of the authorities and looking to the principles of the common law, as expounded by writers and courts of high authority, the Supreme Court of Ohio held (Erwin vs. State, 29 Ohio State, 186) that the charge was erroneous, saying: ‘It is true that all authorities agree that the taking of life in defense of one’s person cannot be either justified, or excused, except on the ground of necessity; and that such necessity must be imminent at the time; and they also agree that no man can avail himself of such necessity if he brings it upon himself. The question then is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself on the ground that he failed to fly from his assailant when he might safely have done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life where the assault is provoked; but a true man who is without fault is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or do him enormous bodily harm. Now, under the charge below, notwithstanding the defendant may have been without fault, and

so assaulted, with the necessity of taking life to save his own upon him; still the jury could not have acquitted if they found he failed to do all in his power otherwise to save his own life, or prevent the intended harm, as retreating as far as he could, etc. **In this case we think the law was not correctly stated.**" 158 U. S., p. 557, 560.

Justice Harlan in the same case quoted approvingly the following passage from *Runyan vs. State*, 57 Ind. 80, 83, 26 Am. Rep. 52.

"A very brief examination of the American authorities make it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defense. The weight of modern authority, in our judgment, establishes the doctrine that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable. . . . It seems to us that the real question in the case, when it was given to the jury, was whether the

defendant, under all the circumstances, was justified in the use of a deadly weapon in repelling the assault of the deceased. We mean by this, did the defendant have reason to believe, and did he in fact believe, that what he did was necessary for the safety of his own life or to protect him from great bodily harm? On that question the law is simple and easy of solution, as has been already seen from the authorities cited above.

The earliest expression we have on the question of retreat is in charge given by Associate Justice Bushrod Washington, while on circuit in a capital case in 1790. *United States vs. Wiltberger*, Case No. 16,938, 28 Federal Cases, p. 728, 3 Wash. C. C. 505.

Mr. Justice Washington's charge on the issue of self-defense was:

"As to this, the law is, that a man may oppose force to force, in defense of his person, his family, or property, against one who manifestly endeavors, by surprise, or violence, to commit a felony, as murder, robbery, or the like. In this definition of justifiable homicide, the following particulars are to be attended to," etc.

A comparison of this charge with the language at page 273 of *Foster's Crown Cases*, shows that Mr. Justice Washington took his charge from Foster's statement of the law, which is as follows:

"In the case of justifiable self-defense the injured party may repel force by force in defense of his person, habitation,

or property against one who manifestly intendeth and endeavorth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable."

It is substantially the same as the declaration by Mr. East on the law of the subject in his *Pleas of the Crown* at page 271, stating the rule to be as follows:

"A man may repel force by force, in defense of his person, habitation or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kills him in so doing, it is called justifiable self-defense."

Mr. Justice Field, in the case of *United States vs. Outerbridge*, 5 SAWY, 620, 27 Federal Cases, No. 15,978, again states the same rule, (note that it is identical with the language used by East, *supra*), and quotes the *Wiltberger* case in support, thereof, saying:

"Now upon this subject of justification the law is explicit. A man may repel force by force in the defense of his person, his family or property, against any one who manifestly endeavors by violence or surprise to commit a felony, as murder, robbery, or the like. The right to oppose force to force in such

case is founded upon the law of nature, and is not and can not be superseded by the law of society."

In this case petitioner was denied the right to repel force with force, but was required to retreat before an unlawful attack.

Mr. Wharton says: "A man may repel force by force in defense of his person, habitation, or property, against one or many who manifestly intend and endeavor, by violence or surprise, to commit a known felony on either. In such a case he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and, if in a conflict between them, he happens to kill, such killing is justifiable. The right of self-defense in cases of this kind is founded on the law of nature; and is not, nor can it be, superseded by any law of society. * * * The right extends to the protection of the person from great bodily harm." Sec. 1019 (2 Wharton's Crim. Law).

Section 485, Wharton on Homicide, cited in the Allen case by Mr. Justice Brown, 164 U. S. pp. 492-497, and cited by the Circuit Court of Appeals herein has no application since it is an express statement of the rule "**in a case of personal conflict, where the defendant seeks to defend on the ground of excusable, (not justifiable) homicide.**" To ascertain Wharton's views on the subject in the latter case, resort should be had to section 1019 quoted from his work in the Runyan case, and approved by this Court in the Beard case. Under the facts in the Allen case, as shown by the dissenting opinion by Judge

Brewer in the first report of the case (150 U. S.) the only issue made by the defendant was whether his offense was manslaughter rather than murder. There was no issue of justifiable homicide, hence the quotation of Justice Brown from Wharton must be confined in its application to the particular case of personal conflict and excusable homicide, in which, as shown in *Russell on Crimes*, quoted in the brief at length, there was always the duty to retreat.

In the *Rowe* case, 164 U. S., p. 546, the facts were that—

The defendant was in the office at a hotel in the Cherokee nation. An altercation arose between him and the deceased, in which the defendant struck the deceased. Thereafter the defendant's conduct indicated his purpose to withdraw from the conflict. The deceased afterward assaulted the defendant with a knife, under such circumstances as to lead him to the belief that he was in danger of death or serious bodily injury. Without retreating the defendant shot and killed the deceased. The trial court charged that it was the duty of the deceased to retreat. The Supreme Court held this error, saying:

"If the accused did, in fact, withdraw from the combat, and intended so to do, and if his conduct should have been reasonably so interpreted by the deceased, then the assault of the latter with a deadly weapon, with the intent to take the life of the accused, or to do him great bodily harm, entitled the latter to the benefit of the principle announced in *Beard vs. United States*, 158 U. S. 550, 564 (39; 1086, 1092) in which case it was said: "The defendant was where he had

the right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such a way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury."

"The accused was where he had the right to be, and the law did not require him to step aside when his assailant was rapidly advancing upon him with a deadly weapon. The danger in which the accused was, or believed himself to be, at the moment he fired, is to some extent indicated by the fact, proved by the Government, that immediately after he disabled his assailant (who had two knives upon his person), he said that he, the accused, was himself mortally wounded and wished a physician to be called. The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary or what he had reasonable grounds to believe at the time was necessary, to save his life or to protect himself from great bodily harm. And under the circumstances, it was error, to make the case depend in whole or in part upon the inquiry

whether the accused could, by stepping aside, have avoided the attack, or could have so carefully aimed his pistol as to paralyze the arm of his assailant without more seriously wounding him."

It will be noted herein, that Justice Brown, who wrote the opinion in the Allen case, dissented in the Rowe case, where the Supreme Court made the right of the defendant to stand his ground depend entirely upon the principle that he had a right to resist a felonious attack without retreating. It is likely that Judge Brown was an adherent of the view that the early common law required retreat in justifiable homicide. The majority disagreed with him. In other words, it is reasonable to interpret that the majority of the court in the opinion written by Judge Harlan, who wrote the opinion in the Beard case, refused to hold that there was the same obligation to retreat in justifiable self-defense that there was in excusable self defense, hence Judge Brown's dissent.

We will call attention to some State cases upholding these views and based on a determination of what the early common law was.

In the case of *Carpenter vs. State*, 36 S. W., p. 905, what was declared to be the common law was enacted as the statutory law on homicide in Arkansas.

Section 1670 thereof defines justifiable homicide as follows:

"Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or

property, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony."

Section 1672 declares that an attempt to commit murder, rape, robbery, burglary, or any other aggravated felony, although not herein specifically named, upon either the person or property of any person shall be justification of homicide.

Section 1676 refers to excusable homicide *se et sua defendendo*.

"In ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary, and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given."

This was made clear by the court in its discussion of these sections, saying:

"These statutes, as far as they extend, are a re-enactment of the common law. They make homicide in self-defense excusable, and justify those committed by the slayer in defense of 'person, habitation or property, against one who manifestly intends and endeavors by violence or surprise, to commit a known felony, such as murder, robbery, arson, burglary, and the like, upon either,' as at common law. As construed by this court, they uphold, protect and enforce the right to slay an assailant in self-defense, to the same extent as it existed at

the time of their enactment. To construe them properly, it is necessary to ascertain what the common law upon the same subject was at the time they took effect.

“At common law, and under the statutes of this State, no one, in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden encounter, or in a combat on a sudden quarrel, or from anger suddenly aroused at the time it is made, or in a mutual combat, is justified or excused in taking the life of the assailant, unless he is endangered by such assault as to make it necessary to kill the assailant to save his own life, or to prevent a great bodily injury, and he employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing. He cannot provoke an attack, bring on the combat, and then slay his assailant, and claim exemption from the consequences of killing his adversary, on the ground of self-defense. He cannot invite or voluntarily bring upon himself an attack, with the view of resisting it, and, when he has done so, slay his assailant, and then shield himself on the assumption that he was defending himself. He cannot take advantage of a necessity produced by his own unlawful or wrongful act. After having provoked or invited the attack, or brought on the combat, he cannot be excused or justified in killing his assailant for the purpose of saving his own life, or preventing a great bodily injury, until he has, in good faith, withdrawn from the combat, as far as he can, and done all in his power to avoid the danger and avert the necessity

of killing. If he has done so, and the other pursues him, and the taking of life becomes necessary to save life or prevent a great bodily injury, he is excusable. *Palmore vs. State*, 29 Ark. 248; *McPherson vs. State*, 29 Ark. 225; *Levells vs. State*, 32 Ark. 585; *Stanton vs. State*, 13 Ark. 317; *Dolan vs. State*, 40 Ark. 454; *Fitzpatrick vs. State*, 37 Ark. 238; *Duncan vs. State*, 49 Ark. 543, 6 S. W. 164; *Johnsen vs. State*, 58 Ark. 57, 23 S. W. 7; *Smith vs. State*, 59 Ark. 132, 26 S. W. 712.

"But the rule is different where a man is assaulted with a murderous intent. He is then under no obligation to retreat, but may stand his ground, and, if need be, kill his adversary." Continuing, the court said:

"In East's Pleas of the Crown, the author says: "A man may repel force by force, in defense of his person, habitation, or property against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglarly, and the like, upon either. In these cases he is not obliged to retreat but may pursue his adversary until he has secured himself from all danger, and if he killed him in so doing it is called justifiable self-defense, as on the other hand, the killing by such felon of any person so lawfully defending himself will be murder. 1 East, P. C. p. 271, See, to the same effect, 4 Bl. Com., p. 180; Foster's Crown Law, 273; and 1 Bish. New Cr. Law. Sec. 850."

"According to the common law, it is the duty of every one, seeing any felony attempted, by force to prevent it, if

need be, by the extinguishment of the felon's existence. This is a public duty, and the discharge of it is regarded as promotive of justice. Any one who fails to discharge it is guilty of an indictable misdemeanor, called 'misprision of felony.' And, as a result of this doctrine, Mr. Bishop says, 'If a man murderously attacked by another flies instead of resisting, he commits, substantially, this offense of misprision of felony even though we should admit that in strict law he will be excused, because acting from the commendable motive of saving life.'

1 Bish. New Cr. Law, Sec. 851, 849; Pond vs. People, 8 Mich. 150, See also, Bostic vs. State, 94 Ala. 45, 10 South, 602; Weaver vs. State, 53 Am. Rep. 389; Gray vs. Combs, 7 J. J. Marsh, 478; 4 Bl. Comm. 180; 1 Hale, P. C. 480; Clark, Cr. Law, 137; 1 Whart. Cr. Law (10th Ed.) Sec. 495."

Cain's Case, 20 W. Va. 679, contains a clear and concise statement of the common law distinction upon the subject. Therein the court said:

"Where there is a quarrel between two persons, and both are in fault, and a combat as the result of such quarrel takes place, and death ensues, in order to reduce the offense to killing in self-defense two things must appear from the evidence and the circumstances of the case—First, that before the mortal blow was given the prisoner declined further combat, and retreated as far as he could with safety; and secondly, that he necessarily killed the deceased in order to preserve his own life, or to protect himself from great bodily harm. When one, without fault himself, is attacked by another in such a manner,

or under such circumstances, as to furnish a reasonable grounds for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such decision will be accomplished, and the person assaulted has reasonable ground to believe, and does believe, such danger is imminent, he may act upon such appearances, and without retreating kill his assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary to avoid the apparent danger."

In *State vs. Clark*, 41 S. E. 207, a careful consideration of the subject, was made by the Supreme Court of Appeals of West Virginia and it declared:

"Where an attack is made with murderous intent, there being a sufficient overt act, the person attacked is under no duty to fly. He may stand his ground and, if need be, kill his adversary." Bish. Cr. Law, Sec. 850. "It is familiar doctrine that one assaulted with murderous intent may avert the felonious result by taking the aggressor's life. The law of self-defense justifies him, but justification rests equally in the fact that he is resisting the commission of a felony." Bish. Cr. Law, Secs. 849, 866. See also, Whart. Hom. Sec. 533; *Manns' Case*, 48 W. Va. 480, 37 S. E. 613. So far as point 1 of the syllabus is in conflict with these principles, it is overruled. "In a case of simple assault, not made with the intent to kill or do other great bodily harm, where the person assailed is not deceived as to its character, so as to be within the rules regarding mistake of fact; in other words, where the

intent of the assailant is not to commit a felony, but a misdemeanor, this right of perfect defense does not exist. The assailed person is not permitted to stand and kill his adversary if there is a way of escape open to him, while yet he may repel force by force, and, within limits differing with the facts of cases, give back blow for blow. The rule, to which the exceptions are not numerous, appears pretty distinctly to be that the law does not justify one in killing another simply to prevent his committing a misdemeanor. **These cases of mere assault, and cases of mutual quarrel, (the Allen case for instance) where the attacking party has not the purpose of murder in his heart, are those to which is applied the doctrine of the books, that one cannot justify the killing of another, though apparently in self-defense, unless he retreated "to the wall," or other interposing obstacle, before resorting to this extreme right.** Bish. Cr. Law, Sec. 850. The only exception to this is where a man is assaulted, without intent to kill, in his own dwelling house. There he need not run or retreat, but he cannot kill his adversary unless it is necessary to save his own life or prevent another felony. Bish. Cr. Law, Sec. 858; *Beard vs. U. S.* 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086."

There are many other cases where the principle has been traced which uphold the views here expressed. See *Erwin vs. State*, 29 Ohio State, *Pond vs. People of Mich.*

In the State of North Carolina, where the retreat rule is adhered to, there has been strong dissent and forcible declara-

tion of what the common law was upon the subject.

In *State vs. Gentry*, 34 S. E., p. 706, Montgomery, J., dissenting, the court said:

"In *Fost. Crown Law*, p. 273, it is written: 'The writers on the Crown law, who, I think, have not treated the subject of self-defense with due precision, do not, in terms, make the distinction I am aiming at, yet all agree that there are cases in which a man may, without retreating, oppose force by force, even to the death. This I call justifiable self-defense, they justifiable homicide. In the case of justifiable self-defense, the injured party may repel force with force, in defense of his person, habitation, or property, against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit a known felony on either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and, if in a conflict between them he happeneth to kill, such killing is justifiable. The right of self-defense in these cases is founded on the law of nature, and is not, nor can be, suspended by any law of society.'

"A distinction which seems reasonable, and is supported by authority, is taken between assaults with felonious intent and assaults without felonious intent. In the latter case, the person assaulted may not stand his ground and kill his adversary, if there is any way of escape open to him, though he is allowed to repel force by force; in the former, where the attack is made with murderous intent, the person attacked is under no obligation to flee. He may stand his ground, and

kill his adversary, if need be.' *Id.* Sec. 633, and cases there cited. And so Mr. East states the law to be—'A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, burglary, robbery, and the like upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and, if he kills him in so doing, it is called justifiable self-defense.' 1 East, P. C. 271; 2 Bish. Cr. Law, Sec. 633. The American doctrine is to the same effect: 'If the person assaulted, being himself faultless, reasonably apprehends death or great bodily harm to himself unless he kill the assailant, the killing is justifiable.' *Id.* Sec. 644. 'The attempt to commit a felony upon the person may be resisted to the death without flying or avoiding combat.' *Id.* Sec. 652."

Another View.

In this case Brown was a contractor, employee or servant of the Government, in the performance of his business, and engaged in carrying out a contract with his employer, owner of the tract of land upon which the assault occurred. He was at what may be termed his place of business, or at his master's place of business. He had been for days at the place engaged in superintending the loading and removal of the dirt by his teamsters.

It has never been held that a man must retreat from his place of business when feloniously assaulted, on the contrary

he may stand his ground. It is also uniformly held that a servant or employer has the same right as the owner. If Brown had owned the lot he would not have been obliged to retreat. He was at the place of his business or his master's business. We submit that this gave him the right to stand his ground.

Even in the States which adhere to the view of the necessity to retreat, it is uniformly held that one who is attacked by another in his place of business, in such manner as would cause a person to believe that he is in immediate danger of death or serious bodily harm, is not obligated to retreat, but would be justified in taking the life of his assailant. See *Andrews vs. State*, 159 Ala., 14; 46 Southern 858; *Carey vs. State* 76 Ala. 78; *State vs. Goodager*, 56 Ore., 198; 106 Pac. 38; *Rehearing denied*, 108 Pac. 185.

In the case of *Haines vs. State*, 17 Georgia, 46, a person entitled to joint use of a well, went there to draw water for his family. While there he was attacked. It was held by the Supreme Court of Georgia, that he was not required to retreat, but might kill his assailant, if necessary to protect himself from death or serious bodily injury.

This right to stand ground applies also to a servant or employee of the owner of the premises in the states where the strict rule of duty to retreat is enforced. See *Snell vs. Dericott*, Ala., 49 Southern, p. 895.

Defense of the Castle.

The right to defend one's home, even to the point of slay-

ing one who forcibly intruded therein, or who assaulted the owner therein, does not seem to have depended at the common law entirely on the fact that the slayer was assaulted feloniously, that is with an intent to kill him. See Section 858 Bishop's New Cr. Law. There it is stated:

"Sec. 858: Defense of the Castle—In the early times, our forefathers were compelled to protect themselves in their habitations by converting them into holds of defense; and so the dwelling house was called a castle. To this condition of things the law has conformed, resulting in the familiar doctrine that while a man keeps the doors of his house closed, no other may break and enter it, except in particular circumstances to make an arrest or the like—cases not within the line of our present expositions. From this doctrine is derived another; namely, that the persons within the house may exercise all needful force to keep aggressors out, even to the taking of life. As observed by Campbell, Jr., in Michigan, a man is not obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life.' And in Missouri a man's business office was held to be his dwelling within this rule."

In support of this text, the author quotes 1 Hale's P. C. 458, declaring:

"A bailiff, having a warrant to arrest Cook upon a capias ad satisfaciendum, came to Cook's house and gave him notice; Cook menaceth to shoot him if he depart not, yet the

bailiff departs not, but breaks open the window to make the arrest; Cook shoots him, and kills him; it was ruled: (1): That it is not murder because he cannot break the house, otherwise it had been if it had been upon an *habere facias possessionem*. (2): But it was manslaughter, because he knew him to be a bailiff. But, (3): Had he not known him to be a bailiff, or one that came upon that business, it had been no felony, because done in defense of his house. *S. C. Cook's Case, Cro. Car. 537.*"

It would seem from the number of cases cited under this text that this doctrine was thoroughly, and well-established.

See also *State vs. Clark*, 4 S. E. R. 207, and *Snell 20 Demeott, supra*.

In the leading case of *Aldrich vs. Wright*, 16 American Reports at page 341 (53 N. H. 398), the Supreme Court of New Hampshire describes the common law theory of self-defense as being the same as that of the natural law recognized by the Bill of Rights, saying:

"Higher and earlier in its origin than the constitution of the common law, not superseded by those temporal and finite systems, but sustained and enforced by the declaration and sanction of the highest, primary, eternal and infinite law of nature (3 Bl. Com. 4; 1 Hale's P. C. (Am. ed. of 1847) 479, note 1, the right of defense cannot be prescribed within the limits of a narrow technical rule. It is an original and comprehensive prerogative, necessarily ascertained and defined by natural reason. It is not established by any fallible authority,

nor measured by any precedent, nor restricted by any arbitrary dogma. Long upheld by the common law, it has, under the administration of that law, theoretically been what it was before; and now, reinforced by a constitutional guaranty, it is what it has always been. The authorities of the common law show what it has been held to be by men whose opinions are entitled to great consideration. If any discrepancy should be found in the definitions of it, given by common law precedent and by natural reason, the latter must prevail, because the right is explicitly asserted in the bill of rights as a natural right, and not as one defined by common law authorities. But between the natural right and its common law definition rightly understood there is no variance that concerns the present inquiry."

* * * * *

At page 300 the New Hampshire court declares that this common law doctrine of self-defense is:

"The authorities are, that a man may oppose a deadly resistance to a felonious attack, but not to a mere trespass (a trespass against a man's castle being sometimes excepted 3 Greenl. Ev. Sec. 117; East's P. C., ch. 5, Sec. 56; Com. vs. Drew, 4 Mass. 391; 396; Rose Cr. E. 770; 1 Bishop's Cr. L. Sec. 858, 5 ed. A man, in defense of his possession of land or goods, "may justify an assault and battery; but he cannot justify either mayheming or wounding, or maiming of life and members, and so note a diversity between the defense of his person and the defense of his possession or goods. 2 Inst.

316. Where the trespass is barely against property, 'the law does not admit the force of the provocation sufficient to warrant the owner in making use of any deadly or dangerous weapon.' 1 East's P. C., ch. 5, Sec. 56. But a man, upon whom or whose property another manifestly intends to commit a known felony by violence or surprise, **is not obliged to retreat**; on the contrary he may pursue his adversary, and kill him if necessary to prevent the felony. 1 East's P. C., ch. 5, Secs. 44, 45; 3 Greenl. Ev., Sec. 115; 4 Bl. Com. 180; Fost. Cr. L. 274.

"Where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting;" but 'the law of England' will not 'suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death.' 4 Bl. Com. 181, 182; 1 Bishop's Cr. L. Sec. 849, 5th Ed. The rule generally laid down is, that a deadly resistance is lawful only against an apparent, forcible felony."

Note—At the common law an assault to commit a known felony was punishable by death. *Id.*

The books are full of the authorities sustaining the contention here urged. We have endeavored, however, to confine our citations to a few of the leading cases lest our argument be too long.

In view of the foregoing array of authorities, as to what the early common law is; in view of the express declaration of approval in the Beard case by the Supreme Court of the

principle upon which they rest; in view of the subsequent recognition, and strong reiteration of the common law doctrine, as a principle, in the Rowe case by the same court; in view of the absence of any Federal statute defining a failure to retreat as an element of the offense of murder, in view of the necessity therefore of resort to the common law to ascertain whether or not this duty existed, we submit, with all due respect and deference, that this court should hold that the Trial Court erred in charging and the Circuit Court of Appeals in affirming that the duty was imposed upon the defendant to retreat before he could resist an assault which, viewed from his standpoint, was calculated to inflict upon him death or some serious bodily injury.

THE RULE OF "RIGHT TO STAND GROUND" IS THE
RULE OF REASON.

It seems to us that the rule contended for by petitioner is in accord with reason. The principal thought that must control the mind of any one who is assaulted by another with apparent murderous intent is the necessity of saving his own life, and not whether he is on one side or the other of a boundary line whose exact location may not be known to him. It would make very little difference to the assaulted party, whether he was killed on his own or another's land. Intent is always the controlling element in determining the culpability of a defendant for the commission of a given act. If this be true, can it be truly said that a man's intent in resisting an unlawful deadly assault with the necessary force is

criminal or not, depending upon whether he was upon one side or the other of an imaginary boundary line enclosing his premises? It seems to us that an arbitrary rule, making the motive which controlled one in killing his assailant, viz—the necessity of saving his own life, lawful on one side of a boundary line, and the same motive inducing the same act, prompted by the same laws of nature, without consciousness at the moment of location or boundaries, wrong, unlawful, and felonious, when committed upon the other side of the line, is not in accord with reason or justice.

If two men, who are tenants in common in a tract of land, are standing beyond the boundary thereof, one six feet, and the other four feet beyond the same boundary, be both attacked at the same time from the same direction by two different assailants unlawfully, and both put in fear of their lives, and both should retreat five feet from the point at which they were assaulted, and then stand their ground, and each kill his assailant, and in each instance there was opportunity for further retreat, could it be said that there was any difference in the justification, because one was one foot within, and the other one foot without the line? Or say for instance that A and B own adjoining tracts, and that near the common boundary line both are on the land of B and they are unlawfully assailed by two persons endeavoring to kill them, and each, in an effort to save himself, controlled by the dominant motive existing in every man's mind of self-preservation, slays his adversary without retreating; say at the time neither A

nor B knew on which side of the line he was, could it be said, with any degree of respect for the principles of the reason, the logic and the justice of the law, that one was guilty and the other not? If neither retreated, and each was controlled by the same motive of self-preservation, could there be any arbitrary duty upon A to retreat, and on B no such duty be imposed? Would A be found guilty of murder and B discharged?

Again, supposing that A and B are assaulted feloniously by C and D on a tract of land, the title to which is yet undetermined, but claimed by both A and B. A and B believing their lives are in peril slay their assailants, without retreating and without stopping to consider in whom the title or ownership of the land is vested. In such case, according to the rule laid down by the Circuit Court of Appeals, the guilt of one and the innocence of the other should be determined by a civil action in ejectment, or trespass to try title, for its decision makes guilt or innocence depend entirely on the arbitrary question of title. This seems an absurd conclusion, yet it logically follows if the right to defend one's self against a murderous assault is made to depend on whether or not the party assaulted has title to the premises on which the assault occurred.

We submit that the rule announced by the early common law writers and recognized by this court in the Beard and Rowe cases, *supra*, is in accord with reason, and the principle announced at the civil law that "right need never yield to

wrong."

The Circuit Court of Appeals erred in not holding that the court below erred in not submitting the issue of assault with intent to murder to the jury.

PROPOSITION.

Where the evidence raises an issue as to whether or not the defendant was guilty of a lower grade of crime than manslaughter, the court should charge the jury thereon.

STATEMENT.

Defendant excepted to the charge of the court, before it was read to the jury, because it did not submit the offense of assault with intent to murder. See Tr. of Rec., p. 244, Par. Three of Exceptions.

The defendant also requested the court to submit as charge to the jury Special Requested Instruction No. 14, which is as follows, to-wit:

"Gentlemen of the Jury:

"In this case there is evidence that the shot that killed the deceased was the third shot fired by the defendant.

"If you believe from the evidence that such was the case, or if you have a reasonable doubt as to whether he was killed by the third shot, or by the fourth shot, and you should further believe that the fourth shot was fired with malice aforethought, express or implied, but you have a reasonable doubt as to whether the third shot was fired under such circumstances that if death had resulted therefrom it would have been murder, you are, in such event, instructed that you cannot find

the defendant guilty of any higher grade of offense than assault with intent to murder, for the results of such fourth shot." Tr. of Rec., p. 258. Bill of Exception No. 24.

EVIDENCE ON THE ISSUE OF ASSAULT WITH INTENT
TO MURDER.

Brown testified that the third shot was the shot that killed the deceased, or at least that one of the first three shots killed the deceased. He further testified that the fourth shot was fired accidentally, and that before he fired the fourth shot Hermes was on the ground in a dying condition. See Tr. of Rec., pp. 195, 204.

Doctors Giles and Heaney, as experts, testified that the fatal shot was fired while the deceased was in an erect position Tr. of Rec., pp. 187-194.

Doctors Egbert and Lander, on behalf of the Government as experts, testified that the fourth shot was the fatal shot; therefore the issue was squarely made. Tr. of Rec., pp.

There was evidence showing that the first three shots fired by the defendant were fired in his necessary self-defense, therefore the issue was squarely made. Tr. of Rec., pp. 131 and 214.

Three of the shots were superficial, and would not have caused the death of the deceased. Rec., pp. 131 and 214.

There was evidence that the third shot was the one which inflicted the fatal wound. See Testimony of Brown, Tr. pp. 195 and 204. Rec. pp. 195 and 204, and of Dr. Heaney, Tr. pp. 187 and 191, and of Dr. Giles, Tr. of Rec., pp. 191 and 194.

Under the theory of the Government, if the third shot caused the fatal wound, the defendant would not have been guilty of a higher offense than manslaughter, while if the fourth shot caused the death of deceased, defendant might be guilty of murder.

The question as to which shot caused the death of deceased became a material issue in the case.

Defendant requested a special charge No. 4, submitting his degree of culpability. See statement set out.

The whole theory of the Government's case, that the homicide was murder, depended upon whether or not the fourth shot was the one that inflicted the fatal wound. The issue was sharply made.

See testimony of Albert Wollschlaeger, Tr. of Rec. pp. 128-131.

See testimony of Robert B. Brown, Tr. of Rec., pp. 195-204 plaintiff in error's brief, pp. 148-159.

Dave Stockbridge, Tr. of Rec., pp. 173-175, plaintiff in error's brief, pp. 146-148.

J. A. Doughty, Tr. of Rec., pp. 148-152, plaintiff in error's brief, pp. 135-138.

Victor Gobeau, Tr. of Rec., pp. 155-156, plaintiff in error's brief, pp. 139-140.

There was evidence that the fourth shot was not the fatal one. There was evidence, upon behalf of the defendant, that this shot was accidental. There was evidence that the first three shots were fired in self-defense. The court charged upon

the theory of accident, but there was also evidence upon the part of the Government that the fourth shot was fired deliberately and with malice aforethought, therefore defendant was entitled to have submitted to the jury fairly and squarely the issue of assault with intent to murder, and exception was preserved to the court's failure to charge thereon. This court seems of the opinion that since the Trial Court charged on the issue of accidental homicide, it was not compelled to charge upon the issue of assault with intent to murder. The issues were entirely distinct, and it was the right of the defendant to have this issue submitted to the jury, and the court erred in failing to do so.

As said in *Bates on Federal Procedure at Law*, Vol. 2, See 1093:

"It is absolutely essential to a common law jury trial, that all issues of fact be submitted to and decided by the jury; and it is the duty of the Trial Judge, who sits to preside over, direct and superintend the trial, to specifically submit all such issues to the decision of the jury. It is not sufficient that he refrain, merely, from assuming to himself the decision of such issues, but he must, by affirmative action, submit them to the jury, and require a decision of them, and it is error for the court to enter judgment so long as any material issue of fact remains undetermined. The duty of the judge is not fully met, and discharged by instructing the whole law of the case; it is an essential element of his duty that he submit all issues of fact to the tribunal established by law for

their determination, and to require their decision before a judgment can be lawfully entered."

The author, at Section 1094, says:

"It is the duty of the court to give in charge the law of the whole case, and if there be any evidence tending to support a controverted fact it should be submitted to the jury with appropriate instructions.

In *Michie on Homicide*, Sec. 307 (2), the author says:

"If there is any doubt whatever, it is the duty of the court clearly to define the several grades of homicide, leaving the jury to find from the evidence of what particular grade the defendant is guilty. The court should charge upon every issue raised by the testimony, including the different degrees of homicide as well as negligent homicide, where the testimony puts them in issue," citing—*Stevenson vs. U. S.* 162 U. S. 313; 40 L. Ed. 980, and a long line of state cases.

The defendant was entitled to have the question submitted, whether the homicide was a lower degree than charged upon his own unsupported evidence, and in—

State vs. Clark, 69 Kansas, 576, and *State vs. Richardson*, 194, Mo. 326, 92 S. W. 649, it is declared that whatever the grade of crime defendant's testimony tends to prove should be covered by appropriate instructions, and the culpability, thereof found by the jury.

It is respectfully submitted that the writ of certiorari should be granted as prayed for.

..... *W. E. Pope*
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 of Counsel.**

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

ROBERT B. BROWN, PETITIONER,	} No. 1019.
v.	
UNITED STATES OF AMERICA.	

*PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

BRIEF FOR THE UNITED STATES IN OPPOSITION.

The points made in the petition as the bases of the application are as follows:

1. The indictment did not allege with sufficient particularity the locus of the offense so as to bring it within the exclusive jurisdiction of the United States.
2. The trial court did not charge the jury properly on the subject of self-defense as a justification or excuse for homicide.
3. The trial court did not submit to the jury the question whether defendant was guilty of any greater offense than assault with intent to kill.

These points are of a kind which constantly and ordinarily arises on the trial in the Federal courts of a case of homicide. Congress has made the judg-

ments of the Circuit Courts of Appeal final in criminal cases. Unless, therefore, the power granted to this Court to review such judgments by certiorari was intended to cover a power to review alleged errors as to matters of necessarily frequent and ordinary occurrence, it would seem that the present case falls outside of those calling for an exercise of the jurisdiction of this Court.

1. The indictment (Rec. 5-9) alleges that, prior to the offense, the United States had acquired certain lands at Beesville, Bee County, Texas, *specifically described by metes and bounds*, "for the public purpose of the said United States," and that on a certain date exclusive jurisdiction over said land had been ceded by Texas to the United States. The Constitution and Section 272, Criminal Code, par. 3, in referring to land over which the United States has exclusive power of legislation or exclusive jurisdiction, refer to it as land reserved or acquired "for the erection of a fort, magazine, arsenal, dockyard, or other needful building." The petitioner claims that the indictment should have specifically alleged that the land was acquired for the erection of a "needful building," and not confined itself to the allegation that it was acquired "for the public purpose of the United States." To this the answer is:

(a) "Needful" merely means "necessary for the public purposes of the United States." The erection of a building is not essential, these words being used merely to mark the type. Whatever land the United States can lawfully condemn under its power of

eminent domain, that it may assume exclusive jurisdiction over on cession by the State. Of the power in the United States to condemn land this Court said in *United States v. Gettysburg Electric Railway Company*, 160 U. S., 668, 679:

It has authority to do so whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution.

The allegation in the indictment, therefore, that the land was acquired for a public purpose was sufficient.

(b) As pointed out by the Court of Appeals, the locus of the land is given in the most specific terms in the indictment. The Court is bound to take judicial notice that it is the site of the post office at Beesville (*Jones v. United States*, 137 U. S., 202, 212), and the specific description of it, taken with the allegation that it was within the exclusive jurisdiction of the United States, is sufficient (*Holt v. United States*, 218 U. S. 245, 247). (See also *Battle v. United States*, 209 U. S. 36.)

(c) As pointed out by the Court of Appeals, the indictment was sufficiently full and clear to advise the defendant of the charge he had to meet, so that no prejudice accrued to him from the omission complained of, and Section 1025, R. S., applies. (See also the Amendment of Section 269, Judicial Code, of February 26, 1919, 40 Stat. 1181.)

2. The charge of the Court on the subject of self-defense will be found in paragraphs 10, 11, and 13-B of the general charge. (Rec. 236, 238.) The charge

requested by the defendant but refused by the Court will be found on pages 252, 253 of the record. (See also Rec. 247.) The petition avers (pp. 4, 5) that the charge of the Court asserted an absolute duty upon the part of the defendant to retreat at all hazards when feloniously assaulted, and this is repeated in the brief (pp. 6, 7, et seq.). It is true that a statement to this effect is made in paragraph 10 (Rec. 236), but it is immediately qualified in paragraphs 11 and 13-B (Rec. 236, 238) by a clear assertion that where an assault is made with a dangerous weapon under such circumstances as to put a reasonable person in fear of his life or of great bodily harm and to make a retreat seem dangerous, the person assaulted may stand his ground and take the life of his assailant. This was the precise state of the record in *Addington v. United States*, 165 U. S. 184, 186-188, and this Court held that the subsequent qualification cured the defect. The same is true of the case at bar.

The general subject of self-defense has been carefully considered by this Court in the cases of *Beard*, 158 U. S. 550, *Alberty*, 162 U. S. 499, *Allen*, 164 U. S. 492 (see especially page 498), *Rowe*, 164 U. S. 546, and *Addington*, *supra*. The general charge of the Court in the case at bar conforms to the rule laid down in these cases. It must be read in the light of the alternative theories of the prosecution and defense. (See *United States v. Battle*, *supra*.) The former was that the deceased had no weapon and made no assault; the latter that the deceased

viciously attacked the defendant with an open knife. There were no peculiar circumstances of locus or personal status as in *Beard's* and *Alberty's* cases. As in *Rowe's Case*, the deceased and defendant were each entitled to be where they were. The charge fully covered the situation and, assuming defendant's theory, asserted his right to stand his ground and kill, not merely if his life was *in fact* in danger and retreat *in fact* impossible, but if a reasonable person would think his life imperilled and retreat dangerous to his personal safety. The apparent danger, not the real danger, was made the test. Further than this the law does not go in favor of intentional homicide.

3. If we understand the third point, it is this: Defendant fired four shots at Hermis, one of which killed him. There was a conflict in the evidence as to whether the fatal shot was the third or fourth. The defendant claimed it was the third, and that the fourth was fired accidentally; and he was, of course, entitled to have his claim presented to the jury by proper instructions. If, then, the defendant, after Hermis was dead, accidentally discharged a bullet which hit the corpse, the offense would be felonious assault under Section 276, Criminal Code. (The petitioner calls it "assault with intent to kill," but there seems to be no such Federal offense.)

This claim seems to be the same, in principle, as that made in *United States v. Battle*, 209 U. S. 36, 38, where the defendant excepted to the refusal of the

trial court to instruct the jury on the law of justifiable homicide, and this Court sustained the trial court because the evidence would not have warranted such a verdict.

So in the case at bar. That the defendant killed Hermis was not questioned. The only question was whether the killing was murder in one of its degrees, (depending in its turn on the degree of premeditation), manslaughter, (as being done in the heat of passion), or justifiable homicide, (being done in self-defense and constituting, therefore, no crime at all). The trial court charged fairly and fully upon these several offenses and their difference in the law. A verdict of guilty of felonious assault (or assault with intent to kill) would have been a travesty of justice from the point of view of the State and of the defendant as well.

The petition should be denied.

CLAUDE R. PORTER,
Assistant Attorney General.

W. C. HERRON,
Attorney.

June, 1919.



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Supreme Court of the United States

ROBERT B. BROWN,

Petitioner

against

No. _____

THE UNITED STATES OF AMERICA,

Respondent.

_____ TERM

On Writ of Certiorari To The United States Circuit Court of Appeals for the Fifth Circuit To Review a Judgment of That Court Affirming the Decree of the District Court of the United States for the Southern District of Texas.

BRIEF FOR PETITIONER.

Statement of the Case:

This case is brought here upon a writ of certiorari issued by this court to the United States Circuit Court of Appeals for the Fifth Circuit on the 9th day of June, A. D. 1919.

Petitioner was indicted in the United States District Court for the Southern District of Texas on January 8th, 1918. The indictment was endorsed, "Murder Committed on land acquired for exclusive use of United States, Vio. Sec. 272 and 275 Penal Code, 1910." Trans. pp. 5 to 9.

The indictment, omitting parts not essential to the determination of the issues herein presented, was as follows:

"The grand jurors of the United States . . . present:

"That long prior to the 7th day of May, A. D. 1917, the United States of America acquired within the geographical limits of Beeville, Bee County, Texas, within the division, district, and circuit aforesaid, a certain lot, tract, and parcel of land for the public purpose of the said United States of America, said land being in three separate tracts as follows, to-wit:

* * * *

"That after the acquisition of said land, and long before the 7th day of May, A. D. 1917, to-wit—on the 21st day of September, A. D. 1915, constitutional and exclusive jurisdiction over the site of said lot, tract and parcel of land was ceded to the United States of America by the said State of Texas in the manner provided by law; that from the date of the deed of cession of jurisdiction to the present time the site aforesaid has been under the exclusive jurisdiction of the United States of America and was under the exclusive jurisdiction of the United States of America on May 7, 1917, and now is under the exclusive jurisdiction of the United States of America.

"That one Robert B. Brown, on the 7th day of May, A. D. 1917, in said district, division and circuit, aforesaid, and on that said lot, tract and parcel of land hereinbefore more particularly described theretofore acquired by the United States of America for the exclusive use of the United States of America for its public purposes, the said lot, tract and parcel of land then and there being a place under the sole and exclusive jurisdiction of the United States of America and out of the jurisdiction of any particular state, and within the jurisdiction of this Court, constitutional and exclusive jurisdiction over said lot, tract and parcel of land having been ceded to the United States of America by the said State of Texas in the manner provided by the law long prior to the com-

mission of the offense hereinafter alleged; did unlawfully, etc.

* * * *

"And so the Grand Jurors aforesaid, upon their oaths aforesaid, do further say and charge, that upon the day aforesaid, at the place aforesaid, on the said land acquired by the United States of America for its exclusive use, as aforesaid, with the said deadly weapon, and in the manner and form aforesaid, and used as aforesaid, the said Robert B. Brown did unlawfully, willfully, purposely, and with his malice aforethought, kill and murder the said James P. Hermes, a human being, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America." (Trans. pp. 5 to 9).

The sufficiency of the indictment was questioned on the ground:

(a): That it charged no offense against the laws of the United States.

(b): That it charged no offense within the territorial jurisdiction of the United States in that there was no allegation that the homicide occurred on lands acquired by the United States for one of the purposes mentioned in Sec. 272.

1st: By motion to quash, Trans. p. 12, which was overruled by the court, to which defendant excepted. (Trans. p. 13).

2nd: By motion in arrest of judgment after conviction, Trans. p. 262. This motion was also overruled by the court, and petitioner excepted. (Trans. p. 265).

The issues of fact in the case were (a) whether the homicide was committed in self-defense or not, and (b) if the homicide was culpable, whether defendant was guilty of a greater offense than manslaughter, or assault with intent to murder.

Petitioner was tried and found guilty of murder in the second degree, and sentenced to fifteen years confinement in the penitentiary at Atlanta. Trans. p. 266. Motions for new trial and in arrest of judgment were overruled, and respondent excepted. Trans. p. 266. Respondent sued out a writ of error. Trans. p. 300. The judgment of the District Court was affirmed by the Circuit Court of Appeals.

EVIDENCE ON ISSUE OF SELF-DEFENSE.

(A): TESTIMONY OF THREATS.

J. A. CARVEL, a witness for the defendant, testified, Tr. of Rec. pp. 179-180, as follows:

Direct Examination.

"I live in Orange Grove. I am a deputy collector of the Internal Revenue of the United States for the Third District of Texas. Before entering the internal revenue service, I was cashier in the State Bank at Orange Grove. Before going to Orange Grove I was at Beeville. I knew Jim Hermes. I also knew Bob Brown. My relations were friendly with both of them. I was cashier and clerk at the S. P. Depot where I lived. My duties brought me in contact with Mr. Hermes. Mr. Hermes made threats concerning Mr. Brown during the year 1914. I think it was in the latter part of August, 1914. I cannot state on how many occasions specifically he made these threats to me, but it was several times. The first time he stated to me that he had trouble with Brown once, and that the next time they would have trouble they would have to carry one of them off in a pine box. His manner at the time was he was so angry that he was crying with rage when he said it. Mr. Brown was not there at the time, and had done nothing to him at the time that I knew of. In talking

about Brown he would get so excited and angry that he would start crying about it. He would not boo-hoo out loud; he would just shake and tears would start to run down his eyes. I conveyed this information to Mr. Brown. I told him this in a casual conversation, that Mr. Hermes had gotten into a fuss with me about this proposition, and I told Brown on the street. During the course of this conversation, that I had with Hermes, he pulled two knives out of his pocket, and said if I wanted to start anything he was ready. In regard to how he pulled out the knife, I was telling awhile ago about this warehouse ruling, which was the cause of it. Hermes came in there and said, 'What do you mean by trying to keep me out of the warehouse?' I said, 'I do not mean anything by it, but we expect to check the freight up before we deliver it.' He said, 'I expect you are trying to favor Bob Brown now; I do not expect you are keeping his men out.' I told him that we were not making any discriminations, that we had to keep everybody out. That was when he whipped out the two knives and asked me if I wanted to start anything, that he was there.

"He said he had trouble with Brown once before, and that if they ever met again one would be carried off in a pine box. Just before he said that he pulled his knife. Prior to that time Mr. Hermes had made similar communications to me two or three times. On the other occasion, in a casual conversation, he brought up the subject of why he disliked Mr. Brown. It was at the depot and before the quarrel I had with him, probably a month or two. He said he did not hate a soul, but Bob Brown, he hated him like poison, he said he had had trouble once before, and that he had been whipped, and that if they ever met again there would be a different tale. One would be carried off in a pine box. Mr. Brown went to the depot about this time on his business. Mr. Hermes

went there too. Mr. Brown came very seldom to the depot himself. I know why Mr. Brown quit coming to the depot." Plaintiff's Brief, pp. 167-169.

JAMES McCOLLUM, a witness for defendant, testified, Tr. pp. 178-177, as follows:

"My name is Jim McCollum. I live in Beeville. Have lived there all my life, except seven years. I was employed in a saloon in Beeville, working with my brother before the saloons were closed there. They were closed in February, 1916. I remember the incidents in the saloon, when something occurred between Brown and Hermes. It was in September or October, of 1915. I was behind the bar, three or four of us were talking when Hermes came in. Those who were in there with me were Mr. Murphy, Mr. Brown, Mr. O'Reilly and Mr. McCollum. Hermes came in at the door, and said something to Mr. Brown, and Mr. Murphy stopped him. Hermes had a knife in his hand. Mr. Hermes seemed to be angry at the time he came in. Walter Malone came in about the time Murphy stopped him. He was a peace officer at the time. Malone took the knife from Hermes. I think Hermes then produced another knife. I did not see that. I was behind the bar. Mr. Malone then took him outside of the building. I know he produced another knife because I heard the boys in front of the bar say so. I heard the statement just as Malone took him outside at the time. They said he came out with a second knife after Murphy had taken the first one away from him. Mr. Malone did not have to resort to any force. He just took it away from him. He just asked him to give him the knife. Hermes said when he came in, 'Brown, you mean that for me?' Brown said, 'I was not talking about you,' and Brown tried to apologize to him, and he told him that he could not apologize to him.

Cross Examination.

"When Hermes came in to the door they were standing at the bar and I was behind it. Brown and others were standing in front. They were just talking. They had had a drink. I do not know how long they had been there. I had been there only about 30 minutes when it occurred, and found them there when I came in. I think I served them some drinks. I do not know how many rounds. I could not say whether I served them one drink or two. To the best of my recollection, when Hermes came he said to Brown, 'You son-of-a-bitch, you mean that for me.' Brown said, 'No, Hermes, I was not talking about you. I did not know you were out there.' That all happened in just a minute, and then Malone came in. Brown tried to apologize to him, and he told him he was not talking about him, and Hermes said, 'You can't apologize to me.' This was after he called him a son-of-a-bitch. Brown did not resent it at all, and did not make an offer to resent it."

J. M. PICKETT, a witness for the defendant, testified.
Tr. of Rec., pp. 165-166:

Direct Examination.

"My name is J. M. Pickett, I live at Beeville. I lived there in May, 1917. I knew Mr. Jim Hermes at that time. I knew Mr. Bob Brown by sight, but if I ever spoke to him I do not remember it. A day or two before the homicide I met Mr. Hermes on Washington street in Beeville. I walked up to where he was on Saturday morning before the homicide. When I walked up they were in a conversation, and someone called Bob Brown's name just as I walked up, and Mr. Hermes says, 'Yes, I ought to have been around there to have cut his damned head off.' That was all I heard. After this statement by Mr. Hermes was made a hearse passed by, before I walked

up to them. I saw it pass just before I got to them, and Mr. Hermes said, that he did not know who was dead, and he said, 'I guess it will be me next.' "

JOE THORNTON, Sheriff and Peace Officer of Bee County for 20 years, testified: Tr. of Rec. 163:

Direct Examination.

"I knew Brown and Jim Hermes in his life time. I knew them both well. Prior to the homicide I had occasion to and talk to Mr. Hermes in the street near the back part of Rees' saloon. I met Hermes in the street. I had talked to him before about his and Brown's trouble, and tried to reason with him that the best thing to do was to quit before somebody got hurt, and he told me to go to hell—that it was none of my business. That was the first time he ever talked mad to me about it, but I had talked to him several times before that. That was about all he said, he walked off one way and I another. The second meeting I came from home and met Mr. Hermes on his wagon, coming from the depot. I was going to the depot and I asked him if he and Brown were having more trouble, and he told me they had had, but it was over. Mr. Hermes said he did not want to make friends with the damned cowardly son-of-a-bitch. He exhibited a weapon at the time. I have seen Mr. Hermes with two knives several times. One was a large one-bladed Barlow, and the other was an ordinary pocket knife.

Q: At the time of the decease of Mr. Hermes did you secure the knives that were on his person at the time?

A: I got two knives from the undertaker, Mr. Walker.

Q: Have you those knives with you?

A: No, sir. I turned them over to Mr. Brennerman who well as I remember that was the morning train, or the even-

ing train from Corpus. Harry Brown was Bob Brown's son. When I got there Hermes had his knife out, and had Harry Brown standing leaning up against the wall of the depot, and Hermes was telling him that he had as much right to solicit trade there as he had, and that he did not want to have any trouble with him, and he was cussing Mr. Brown to Harry, and told him, 'I will cut your head off,' and he told him something about, using the big knife he had on Mr. Brown, but as well as I remember it the knife he had in his hand then was a small pocket-knife.

"He had Harry Brown up against the wall of the depot. Harry was something like 17 or 18 years old at that time. He is in the United States service now. I went to Mr. Hermes, and got hold of him, and told him to put his knife up, and told Harry to go on off, and he went. Mr. Hermes was there standing with his knife in his hand, holding it up like this. He was mad. I do not know to what extent, he was mad and abusing the boy, talking about using his knife on him. Another time I made him put up his knife, when Mr. Ruebush (witness interrupted). I do not remember how many times Brown asked me about having Hermes put under a peace bond. I know he came to me one time, and I told him to go and talk to Mr. Thornton about it. He was the sheriff. I represented himself as a Federal officer, and took his receipt for them.

Q: Will you describe those two knives that you got and turned over to Mr. Brennerman? (He was not permitted to answer).

PAUL PERKINS, a witness for the defendant, testified as follows, Tr. of Rec. pp. 182 to 184.

Direct Examination

"My name is Oscar Francis. I live in Skidmore. I have lived there for six years. I am a car inspector for the S. A. & A. P. Ry. running through the town of Beeville. I was at the train one day and I saw Mr. Hermes there at the time. There was some difficulty. The difficulty was with Mr. Brown's son. That was the one he spoke of. I did not know the young man. He was a fleshy kid, and when the difficulty was over I inquired who the boy was, and they said it was Mr. Brown's son. That was some 3 or 4 months before the homicide. The trouble came up about something, I never paid much attention to it. I went over there to do some work, and I had just finished the job, and was going back on No. 11. It was 6:25 in the afternoon, that was the time the train was due, and it was just pulling in. I did not see the first part of it, I saw Mr. Hermes, or a man supposed to be him; I did not know him at the time; I paid attention after he drew the knife, and I eased up close to where they were at, and they were crowding around; he drew the knife, and I did not know the exact words he said, but there was something that he made some threat about he was going to fix his daddy; I could hear something about jumping on his daddy, and he said something about he would fix him. He pulled the knife on the young man. He looked like he was about 18 or 20, Mr. Brown's son. He was pretty close to the young man when he drew the knife; pretty close to him. I eased up there because I did not want to see him over-run, in case that nobody else interfered. I did not want to see him over-run the kid with a knife, but I believe it was Mr. Perkins who came up about that time. He was constable. He interfered and made him put the knife up I believe. After a good little bit, after Mr. Perkins had made

him put the knife up, and he kept talking, and he put his hands in his pocket and got another one out, and with the two in his hand shook them that way. One of them was an average size, and the other one was smaller. I believe one of them was a Barlow, a bone-handled knife. I never paid much attention to it. I was in a hurry to get to the train. One was pearl handled I believe, and the other was a bone or horn handled knife. Mr Hermes was very much stirred up. He was awfully mad apparently—awful angry.”

HIRAM CHENEY, a witness for the defendant, testified.
Tr. of Rec., pp. 186.

Direct Examination.

“My name is Hiram Cheney. I live in Beeville, Bee County. I am a farmer. I saw a difficulty between Mr. Ruebush and Mr. Hermes in the town of Beeville. It occurred in the Busy Bee Restaurant either in January or February. I heard a threat made by Mr. Hermes in regard to Mr. Brown. He said he had the change for Mr. Brown. At the time he was standing there with his knife in his hands. He acted like he was mad to me. I was in the restaurant at the time this happened.”

IKE ARCHER, a witness for defendant, testified:

Direct Examination.

“My name is Ike Archer. I live in Beeville. I knew Mr. Hermes in life time. I have known him ever since I lived in Beeville, about twelve years. I remember when they started to build the postoffice at Beeville, and started the excavation. I remember the time of transferring some person's household goods there along about that time or before then. I was working for Mr. Robert Brown at that time. I have worked for Mrs. Hermes since the death of Mr. Jim Hermes. I had

a conversation with Mr. Hermes there one Sunday soon before the beginning of this excavation. I was coming out of the city one Sunday, me and my wife. I went around by Mr. Berry's, and Mr. Hermes waited on the corner and met me, and said, "Hello Nigger," and he walked on down toward the ice plant, and I was on the walk holding my little colt eating grass, and he said, "You know, Ike, that boy of Bob Brown's liked to have run in to me the other day." I said, "Yee." He said, "Don't you think that Bob put him up to it?" I said, "Mr. Hermes, Mr. Brown didn't know that his boy." (Witness interrupted). Well, he says to me, "This boy was coming down the street with his automobile, and he liked to have run into my mule," that he did not know whose boy he was until he had passed him, and Mr. Miller said it was Mr. Brown's boy, Leonard. Mr. Hermes said that he believed Mr. Brown put the boy up to do this, that him and Mr. Brown had had a row, and Brown would not fight him when he had his knife, and he said Bob was going to ask him to throw away his knife, if they had another difficulty, and he was going to throw one away, but the other one he was going to keep it, which was the bigger one, and the little one he showed me, the one he was going to throw away, and the big knife he was going to put up his sleeve. He said he was going to use the knife on Brown. That is part of it, but you all won't let me tell the conversation like I heard it. I was sitting on the side walk, and he said, "See here, nigger," and he showed me the knife. I don't know what sort of knife it was, I did not pay any attention to it. He said he was going to put his knife up his sleeve. I do not know how many knives Mr. Hermes ordinarily carried. On that day he had two knives. He had one little knife and a big knife. I do not know what sort of knife the big knife was. I told Johnnie Ruebush about this.

It was done on Friday and I told Johnnie on Monday. I was hauling dirt all the morning on the day of the homicide, back and forth."

RUFUS TAYLOR, a witness for the defendant, testified, Tr. of Rec. 181, as follows:

Direct Examination

"My name is Rufus Taylor. I live in Beeville. I have lived in Beeville 26 years. I am cashier for the G., H. & S. A. Railway. I knew Mr. Hermes in his life time. I saw him every day before the date of his death. He has made threats to me with reference to Mr. Bob Brown on several occasions. It was Friday afternoon before he was killed on Monday. That was the last occasion that he made a threat to me about Bob Brown. Hermes made the remark that Mr. Miller claimed they were having some trouble over the dirt at the postoffice building, and Hermes told Miller that if there was anything else to come to let him know; that if he could not settle it he would fix Mr. Brown. They had had some trouble before about some package, and he was telling me about it at the depot. He told me that he had it in for Brown, that he had offered to make up with him, but that he did not have a temper that way, that when once he got it in for a man he could not make it up. He told me that Brown had made the offer to make up. He said if ever they had any racket again, that one or the other of them would have to buy a black box. I do not know exactly when this was. There was something coming up all the time I was at the depot. There was always difficulty some way or other with Hermes and his competitors. I had a conversation with John Ruebush, after this conversation, on Friday night. We were neighbors, and happened to be in the yard at the same time. I told him about the circumstances. We discussed the situation.

JOHN RUEBUSH, a witness for defendant, testified as follows, Tr. of Rec., pp. 169-169, 169-170, 171-173:

Direct Examination.

"My name is John Ruebush. I live in Beeville. I was employed during the month of May by Robert B. Brown in the transfer business. I had been working for him about seven years. My duties were that I met trains, hauled trunks and got freight and rustled business. I knew Mr. Jim Hermes ever since I have been in Beeville. I know Mr. Rufus Taylor, the agent of the S. A. & A. P. Ry. I have known him ever since I have been there. Mr. Taylor told me Friday night before it happened on Monday that Mr. Hermes was up at the depot talking to him, that Sol Miller had told him that Brown said that he could not get any more of that dirt, and that he wanted to see him about it, and Mr. Taylor said that he told him he was going to get in trouble about listening to Sol Miller's tales. Taylor told me he had said that if he said any more about it to tell him and he would go down and fix Brown. He said he would fix Brown. I told Brown that I think it was Saturday morning when I was riding down on the wagon that I told him.

"I told Mr. Brown that Archer told me the next time Hermes jumped on him and he asked him to throw away his knife, that he was going to throw his little knife down, and snatch his big knife out and cut him. I told Brown this about a week or ten days before it happened. Mr. Hermes directly communicated to me a threat. He jumped on me in a restaurant and shook a knife at me. I told Mr. Brown that he shook a knife in my face, and Hermes said that he had the change for me and Brown both. Prior to that at the Aransas Pass depot, I heard Mr. Hermes make a statement about Mr. Brown.

That was about a year I think before it happened. I told it to Mr. Brown. I told him that Hermes said the next time that he and Bob Brown had a fight that one or the other of them was going to take a black box. That was all Hermes said at that time. I heard him say one day in front of the depot about six or eight months before that that him and Bob Brown had a fight, and that Brown whipped him, and that he got his gun with the intention of killing Brown, but that one of his friends took his gun away from him."

(B) TESTIMONY OF OVERT ACTS AT TIME OF HOMICIDE SHOWING PURPOSE TO CARRY THREATS INTO EFFECT AND ALSO OF ACTUAL FELONIOUS ASSAULT ON PETITIONER BY DECEASED WITH INTENT TO KILL PETITIONER.

ROBERT B. BROWN, defendant, testified, in his own behalf. Tr. of Rec., pp- 195-199, 199, 200-201, 202, 203 and 204:

Direct Examination.

"My name is Robert B. Brown. I am the defendant in this case. I was 44 years old the 28th of this month. I am a man of family. I was born in Clinton, DeWitt County, Texas. I reside in Beeville. I resided there about 30 years, I think, to the best of my recollection. I was engaged in the transfer business in Beeville. My duties are overreaching it. I operated wagons. I remember the excavation, the beginning of the excavation of the postoffice building over there. I remember about when it was when it commenced, in a general way. It must have been in April of last year. I have heard the testimony in regard to the killing of Mr. Hermes. I went down to the site of the postoffice excavation and building on the day the witnesses have spoken about, on the 7th of May, 1917, in the afternoon. I took arms down there with me that after-

noon. When I left it was sprinkling a little, it had rained the day before. I went to town on one of my wagons. I had four. A negro driver by the name of Ike Archer went with me. I took a six-shooter with me—a forty-one. It had six chambers. The reason I carried my pistol down there that afternoon I had heard about Hermes and his threats, and I carried it down there to protect myself. I heard the threats from Reubush. Reubush and Carvel had warned me in the matter. I had had previous difficulties with Mr. Hermes. Prior to that time Mr. Hermes had assaulted me with a knife. I had been at work hauling dirt ever since a few days after the postoffice site work commenced. I had done the excavation work for the Government, except the first two days. In taking out the dirt we put clay dirt in 2 or 3 different places. We took the black dirt first from the excavation. The black dirt was placed on the west side of what we called the pit. The white dirt was up against the black dirt for a certain distance, and then for another distance from the light pole to the end down to the street it was all white dirt. The white dirt was on the east side next to the pit, and the black dirt was on the west side of the white dirt next to the alley. That dirt formed the dump we have been talking about here. The dump was about 5 or 6 feet high. I think it was higher in some places than it was in others. The dump was about 150 feet long. It ran from the street back to the back line. I had been on that work all the time, from the time of the excavation to the day of the homicide. I had at no time interfered with Mr. Hermes or Sol Miller in getting dirt there. I knew Mr. Hare. With reference to the Government work he was foreman of the building. It was between 3 and 3:30 that Miller drove up. I was standing at the back facing east against the light post. I was engaged in checking loads from the wagons that they loaded.

I had not at any time prior to that during the period that I had been at the excavation, or during the period that the dirt was being hauled, ever interfered in any way with Miller or Hermes in their getting dirt there. My attention was first called to the wagon when I heard it coming in behind me, and it drove up and stopped. I then stepped away from the post and walked on down south. The wagon was facing north. The post was right in the edge of the dump. As I walked to the south I was walking on the dump. Mr. Miller was at the front of the wagon, and Hermes back of it. I did not see Mr. Hermes at first. I saw Sol Miller first. I just told Mr. Miller that Mr. Hare had asked me to tell them not to haul away the black dirt, that he wanted to use that. He did not make any reply, but Mr. Hermes took it right up, and said, 'God damn you; you are not running this dirt proposition. I came up here to see about it,' and he ran his hand in his pocket and came up the dump with his knife open, and I ran toward my gun, lying back, and I picked up my slicker; I backed and kept backing until I could get my gun out of the slicker. At that time Hermes was striking at me with his right hand—with a knife in his hand. As Hermes came up the dump I told him to stop. He did not stop. I had to go back about 25 feet, 20 or 25 feet to where I got my gun out of my slicker. Mr. Hermes must have been 4 or 6 feet from me at the time I reached down and got my gun out of my slicker. After I got the gun out the slicker I told him to stop. He just kept coming, striking at me. When I got the gun I told him to stop, and I fired it. When I fired the shot I was running backward. He was coming forward toward me. He had a knife in his hand. The blade looked about 3 or 3½ inches long. I thought Mr. Hermes was trying to kill me. He had drawn a knife on me twice before that. Prior to that time I had re-

Q: Then what?

A: Mr. Lutz took his knife away from him."

* * * * *

Q: Mr. Brown, after that, did you continue in the transfer business?

A: Yes, sir.

Q: When was the next time that he assaulted you?

A: It was in the McCollum saloon.

Q: What happened there; tell the jury as near as you can recall?

A: Mr. Tom Clare, and John Murphy and Reilly were standing in there, laughing and joking."

* * * * *

"I did not give any provocation to Mr. Hermes of any character at that time. I had not spoken to Mr. Hermes at the time of the assault. He came running in there with his knife open. Very mad, and Murphy caught him. He said that I was talking about him. Mr. Malone came in and took that knife from him. He was still very mad, and pulled out another knife, and Malone took that away from him, and I told him that if I had said anything, which I had not, that I would apologize to him, and he said, 'You son-of-a-bitch, you can't apologize to me.' At the time he said this he was in the custody of the officer, Malone, took him off. After that I went back to my horse in front of Mr. Teal's market to go home. Mr. Hermes had threatened my life that way several times in all. Mr. Carvel, Mr. Ruebush, Mr. Parr and Harry had told me of the threats which he had made. After Mr. Hermes made the assault on me in the saloon, I quit going to the depot only when I had to. I consulted Mr. Perkins and Mr. Thornton, sheriff and constable about that. I endeavored to have Mr. Hermes put under a peace bond. I talked to the

officers about putting him under a peace bond but they never did it. After that I never did anything to Mr. Hermes. I kept out of his way, and made it a point never to meet him if I could help it. Johnnie Ruebush and Jack Carvel had both communicated threats to me, one of the threats that Ruebush told me of was from Rufus Taylor. The last one was communicated to me Saturday before the homicide. Johnnie told me that he said that if I interfered any more with that dirt that he would 'fix my clock.' That is what he told Mr. Taylor. In the light of what had gone before I understood he was going to kill me. I had received word before through Mr. Carvel that the next time we would have a fight, there would be one of us to go off in a black box. Johnnie Ruebush told me that Hermes had told Ike Archer that he was going to fix my clock, that he was going to have two knives; throw one away, and the big knife he would have up his sleeve to cut me with. I knew that Hermes had two knives at the time he pulled them in the saloon. At the time he pulled the other knife I never did see but one. When I was on the dump going backward, Hermes was coming pretty fast, as I was stepping back about as fast as anybody could run backwards without falling. I was stepping back as fast as I could without falling. When Hermes and Sol Miller drove up, I did not say to Hermes, 'You came here for a fuss,' and Jim did not say, 'No, I do not want any trouble with you.' I did not say to Hermes, 'You damned son-of-a-bitch, you have been trying to pick a fuss all of the week.' I did not speak to Hermes at all, only told him to stop. I was talking to Miller. Hermes had not been at the dump that week—I had not seen him. I had not seen him at the dump for seven or eight days. I had been going to the dump every day to superintend. It was necessary in the transaction of my business for me to go down there. I had an office and

telephone headquarters in Hunt's garage. Will Hoolihan had been hauling dirt with Mr. Miller up to the time of this load. I thought when they drove up it was Hoolihan, up to the time Mr. Hermes spoke. I would not have spoken to them if I had known it was Hermes. After Hermes fell, after the third shot, and as he went to fall, I stepped around, two or three steps toward his feet. I was very much excited during the period. At the time I shot him what was in my mind was that he was going to kill me with a knife."

* * * * *

Cross Examination.

"It must have been over two years ago that Hermes attacked me in the saloon. Somewhere in 1915, I would not say for sure. It was about two years ago, from the time this offense happened somewhere along there, I could not say for sure. It might have been the middle of 1916, or the first of 1916. I could not say exactly. The trouble in the depot was about nine years ago, somewhere in that neighborhood, I could not say exactly. On the day I killed Hermes when I first saw the wagon, it drove up right behind me, I heard it before that, but I never noticed whose wagon it was. There had been other wagons there—there was Mr. Bell and others hauling. My wagon came up to the east side of the dump, and this wagon came up on the west. When it stopped I walked away from the telephone post. I did not know that Hermes was there. I knew there was somebody on the back of the wagon. When I first saw Hermes he was on the back of the wagon raising the side boards. I said to Miller that Mr. Hare said not to haul off the black dirt, that he wanted to use it for his own use. Miller did not say anything. Hermes took it up. he said, 'God damn you, you are not running this dirt busi-

ness, and I came down here to see about it.' He said, 'God damn you, you are not running this dirt proposition.' I did not say, 'You son-of-a-bitch, you can't get any of it.' He then came up the dump with a knife in his hands. He was about as far as from here to that table when he said, 'You are not running this dirt proposition. (Referred to a table about ten feet from witness). It would be further than that, he was on the ground, I suppose about 20 or 25 feet. He got out his knife then, and came up the dump. He commenced cutting at me when he got close to me. He was four or five feet from me. He was coming with his knife in his hands. I said he was 4 or 5 feet away when he struck at me. He was holding up his knife, striking at me all the time, from just before the first shot. He got as close to me as $2\frac{1}{2}$ or 3 feet with that knife. I do not think he ever struck me with it. I was not cut. He did not cut my clothes. He was still striking when I fired the second shot. He was just coming this way. (Illustrating). I cannot say how many times he struck at me before I shot at him the first time. He struck more than once. I could not say for sure. He struck as many as two times. I am certain that he struck at least two times. I was very excited. He then kept coming. He then got closer than he was at first, and he was $2\frac{1}{2}$ or 3 feet at first. At the second shot he was closer than at the first. I could not say exactly. He was closer than he was at the first shot, still striking. At the third shot he had his knife in his hand, and he caught the gun with his left hand. He was still striking at me. I pulled his hand off the gun. About that time I fired, as his hand came off the gun. He then fell. When he went to fall I stepped back and let him fall. After the third shot I hit him. He was standing up when I hit him. I said he fell after the third shot. I did not say right after the third shot. He fell after the third shot.

I shot the third shot before he fell. When I hit him with the gun he was still coming at me, and still striking at me.

Q: How many times did he strike after the third shot? I do not want you to make any mistake on this. After you had fired one, two, three shots, and after that third shot, he was still standing and coming forward, striking at you with that knife?

A: He came toward me.

Q: He was coming forward, was he not?

A: Yes, sir.

Q: He was still coming forward and striking at you with the knife, is that correct?

A: When I hit him with the gun he was.

Q: And that was after the third shot, was it not?

A: Yes, sir.

Hermes then fell. I could not say whether when I hit him with the gun it knocked him down or not. He fell and turned to the left. Not with his back toward me. He turned around facing me when he fell. He turned around about that far (illustrating), and then fell. That would be in the general direction of his back toward you. He was falling all the time. I was on his right side when he fell. I did not walk from the left to the right. I heard several of the witnesses testify. I say it is not correct when they say I was on his left side when he fell, and then walked around to his right. When he fell down flat, I had my gun up this way, and I went to let the hammer down and it went off accidentally. I do not know which way the gun was pointing, but it went off accidentally. I did not intend that shot to hit him. I could not say where it hit him. I did not do anything to help him, after he was down. I did not intend to kill him when he was lying on the ground, but I did not go to see if that accidental shot

had killed him. I don't say I did not care. I was excited. I do not know what I thought. I asked Sol Miller, 'Why did you bring him here?' I tell the jury that I was trying to let the hammer down, and the gun accidentally shot him, and I did not intend to shoot him that fourth time. I did not tell anybody to go to him, to help him. I never said anything to anybody. I walked on off. Hermes was left there. I went over to the courthouse. He was not begging me not to shoot him, and I was not talking to him there.

Re-Direct Examination.

"The gun was not a self-cocking gun. The shooting was all right now. I hit him after the third shot; just after I jerked it out of his hand I hit him."

JOHN RUEBUSH, a witness for defendant, testified as follows: Tr. of Rec., pp. 169-169, 169-170, 171-173:

Direct Examination.

"On the day of the difficulty I was hauling freight out of the Sap depot, at about 3 o'clock and 20 minutes. The train came in, I think, about 3:20. That was the northbound. I saw Mr. Hermes there at the depot. He was working the train as usual. I saw him after that. Sol Miller was hauling dirt, and him and Sol Miller was standing at the back of his wagon, and Hermes was nodding his head, and acting like—— (Witness interrupted). Mr. Green:

We object.

Mr. Dougherty: State what his facial expression was.

A: I would judge he was mighty angry.

* * * * *

"Mr. Hermes was a good little piece from me. About 40 or 50 yards. I have seen Mr. Hermes when he was angry before that. He looked like he was mad to me. That is all I

can tell you. While this conversation was going on, they were standing right at the end of the Sap depot, close to the front platform, behind the wagon. Mr. Hoolihan was on the front of the wagon. I think Mr. Miller had been driving, but Hoolihan was holding the mules. They stayed there just a minute or two. Miller went on and dumped the dirt, and Hermes went along by the postoffice, and when I came out Hermes and Miller were both on the wagon, and they drove around to where they were getting dirt. I went ahead and went to Gregory's and to the telephone company. I went to Gregory's store, and had delivered the freight, and collected the money, walked to the back door, and looked out when they drove up. They drove in and turned around and Brown was standing by an electric light pole and they drove close to him, and he got out of the way and walked on the dump, and Hermes jumped off the wagon, and started up on the dump. It seemed that he kinder slipped back, started again and went up. When he went up Brown started off going off sideways, trying to get out of his way, and running over his slicker. He grabbed his slicker up in his hands and began to shake it, and by that time they had run behind the little house and when they ran behind there I heard the first shots fired, and when I ran out of the door the second shot was fired. I saw them at the second shot. Brown was backing and Hermes was crowding him. I mean by that he was going on to him. They were about four or five feet apart. The next thing I saw Hermes make a grab at the gun, and Brown threwed the gun up, and Hermes grabbed at the gun with his left hand and throwed his left hand around and the third shot was fired, and Hermes wheeled and fell about half way past Mr. Brown, and he fell kinder on his shoulder, over to one side, and then he got up in a kind of a humped position. Brown kinder took a step

Direct Examination.

or two before his feet and had his gun toward his side and the fourth shot was fired. Then Brown took his gun from his left hand to his right hand and walked on off. I was in the back of the Gregory store in the door. The store was kinder north from the difficulty, across Bowie Street. The house that got in line between me and the parties was a pretty good sized little toilet out there. I could not say whether Hermes had a knife or not. At the third shot they were right up at one another in grabbing distance.

Mr. Dougherty (Resuming)—Show the jury what you meant Hermes was doing with his right hand.

A: Well, I could not tell exactly; he grabbed at the gun with his left hand, and his right hand was going around that way (illustrating); I could not see what he was doing; it fied as follows: Tr. of Rec., pp. 173-174 and 175:

DAVE STOCKBRIDGE, a witness for defendant, testified like he was striking at him in some way."

"Two shots first attracted my attention to the difficulty. I turned around to see what it was. Back of me, the way I turned to look, I saw up on a pile of dirt thrown out of this excavation two men, the defendant, Mr. Brown, and the deceased, Mr. Hermes. Mr. Hermes was going toward Mr. Brown, and looked as if he was trying to strike him, and to be reaching for him. He was endeavoring to strike him with his right hand. He was reaching, striking like this (making motions). It looked to me all the time that he was going towards him. He was reaching like this with his left hand (illustrating). With his right hand he seemed to be striking like and reaching. They were not more than 2 or 3 feet apart. I could not see from where I was whether or not Hermes had anything in

his hand. I did not think about that; I saw him for a few seconds. I did not see anything in his hands. I do not know whether he had anything in his hand or not. The two shots that had been fired attracted my attention, and I saw Hermes going after Brown. They continued to go for several steps, and I saw him shoot the third shot. I was standing at just a little angle off of a direct line from the way the gun was pointing, and I thought about moving, so I turned and walked off around the north side of the excavation. Meantime the fourth shot was fired, while I was going to the north side of the hole, and I turned and looked back and Hermes was on the ground down and Brown was walking off, going north."

* * * * *

Cross Examination.

"There was nothing between me and Hermes' hand to obscure my vision in any way. I was about 30 steps from Hermes at that time. I could see his hands, but I do not think I could have seen anything in them in the short time I was looking at them at that distance. I mean to leave the inference to the jury that he had something in his hand there, that he had something in his hand. I think he had a knife. I think this, because he was reaching."

J. A. DOUGHTY, a witness for defendant, testified as follows. Tr. of Rec., pp. 148 to 152:

Direct Examination.

"My name is J. A. Doughty. I am 61 years old. I knew Jim Hermes in life time something like 15 years and Mr. Bob Brown something like 15 years. My relations with both were friendly.

"I was at the scene of the difficulty that resulted in the death of Mr. Hermes on May 7th, 1917. I happened to be

idle, and had no work in my line, and I went around over there where the men were working. My line of work was windmill and water supply work. I was down in the basement there where they were putting in some concrete, and I was on the east side of it; in the pit. I was very few feet from the east side of the pit. I do not suppose I was more than 4 or 5 feet. From where I was standing I had a view of the whole dump, except a little at one end where there was some wagons. That was the north end. The first I saw of the difficulty I heard some say, it sounded to me like 'Stop.' I looked up and saw them on the dump. It seemed to me that Mr. Brown made the statement 'Stop.' At the time I saw them Mr. Hermes was getting up on the dump when I first saw him. Mr. Brown was up on the dump. The next thing I saw Mr. Brown was backing off. He was backing a good deal in the direction, and a little to the south of where I saw, backing sort of up in that direction, only a little south. He was on the dump. He backed several feet, and Mr. Hermes was crowding him, and striking as I thought with a knife from the licks he was making. Mr. Brown was backing until he came to where his gun was on the dump, and he picked that up and kept backing. His gun was in a slicker. To get it out, he grabbed up the slicker and unrolled it. He commenced shooting then and Hermes was crowding him closer. I could not tell how close they were together at the third shot exactly, but they were pretty close together, looked to me to be mighty close together. After the third shot there was a fourth shot, and then Mr. Hermes fell, and Mr. Brown walked off. I never heard any conversation between Mr. Brown and Sol Miller after that shooting. I heard him, Brown, say, 'What in the world did you bring him here for?' or words just about similar to that. I could not tell just ex-

actly what effect the third shot had more than some of the other shots. It looked like Mr. Hermes started falling about the third shot, just a second afterwards the best I could tell. He fell sort of to this side, and went down on his back like. I did not see Mr. Brown fire the fourth shot, because he was directly between me and Mr. Hermes. Hermes, it looked like, was passing that way as he started to fall, and Mr. Brown started to move this way like, and was right between me and Mr. Hermes. When I saw Mr. Hermes come up on the dump, pretty close to the north end, the best I could tell a few feet from the north end of the dump. Being right on the other side of Mr. Brown from him, I could not tell how far Mr. Brown was from Mr. Hermes when Mr. Hermes got up on the dump, but he was a few feet away. At that time Brown was backing off from him, he had not gotten his gun at that time. I saw Brown when he stooped to get his gun. At that time Hermes crowded up pretty close and made a motion like he was cutting at him. Mr. Brown retreated from where he got his gun to where Mr. Hermes finally fell, at least 18 or 20 feet."

Cross Examination.

"I say that Hermes had his hands up like he was cutting at Brown with a knife. He made several licks. That was when the first shot was fired, and I think maybe before the first shot. I did not see any knife. I was not close enough. I was some 85 or 90 feet from him. Hermes kept striking pretty often. I suppose he did not reach Brown with any of them. I could not tell how far he was from him at the second shot; he was pretty close. Nearly close enough to strike him, but it looked like he did not strike him. I could not tell you whether he was as close at the second as the first shot.

Hermes' position, after the first shot, looked to be the same until the last. He was striking all the time until about the time he began to fall. Every time he was in reach it looked like he would strike, but as to how many times I could not tell. I then saw him fall. He sort of turned as he fell, and came right back. He was not striking at Brown while lying on the ground. I did not say he was on his back. I said when he fell, he fell back that way. (Illustrating). He sort of turned that way and went down. The best I could tell he went back on his arms. Brown did not shoot him after he was on the ground. The best I could tell, when the fourth shot was fired, was about the time when Hermes started to fall."

JOE THORNTON, sheriff of Bee County for over twenty years, testified as follows: Tr. of Rec., pp. 166-167.

Direct Examination.

"After I had put Mr. Brown under arrest the condition of the palm of his right hand was powder burned. It was powder burnt clear across there, about as wide as a man's finger. I got him water to wash it off. That was immediately after the homicide. I suppose it may have been five minutes after the homicide, hardly so long."

HOMER LEE McKINNEY, a witness for the defendant, testified. Tr. of Rec., p. 160:

Direct Examination.

"My name is Homer Lee McKinney. I live in Beeville. Have lived there about 25 years. I was in Beeville on the day of the killing of Mr. Jim Hermes. I was at the scene of the homicide immediately after the killing. I saw Mr. Joe Thornton there. He is sheriff. He was summoning witnesses for an examination trial, I believe. I went over to speak to Mr. Thornton. I called his attention to a slicker that was lying

there on the dirt that was thrown out of the basement of the postoffice building, and also a coat. While I was there I saw Mr. Sol Miller. He came up to where Mr. Thornton was. I was standing with Mr. Thornton, and then he came up. He came to see him, Mr. Thornton, not me. Mr. Sol Miller said to Mr. Thornton, 'Mr. Thornton, Paul Perkins knows how come me with Jim Hermes' knife.' He said that in my presence. He made no further explanation of it. When Sol Miller made this statement to Mr. Thornton, Thornton was going toward the court house at the time, and I do not know that he said a word to him. If he did I did not hear him.

On issue that the shot which inflicted the mortal wound was the third shot, and not the fourth shot, see testimony of Robert B. Brown, Petitioner, Trans., pp. 197-198.

Brown testified in affect that the third shot inflicted the fatal wound, that when Hermes fell on the ground after the third shot he was dying and that he, Brown, would not have shot him under such circumstances, but that in an effort to uncock the pistol and in the excitement of the moment the pistol was discharged. This fourth shot, under this statement, was the one inflicting the wound in the leg—which was not a mortal wound.

On issue that Brown was at his place of business at the time of the homicide he testified, (Tr. of Rec., pp. 195 to 196), that he was employed by the Government to handle the excavation for the building, and at the time was engaged in superintending the removal of the dirt.

In submitting the issue of self-defense, the court charged that it was the duty of defendant, though without fault on his part and notwithstanding he was being feloniously assaulted by Hermes with a deadly weapon, to retreat, before he could resist such assault, and exercise his right of self-

defense. To this charge the defendant excepted. Trans. p. 244.

The portion of the charge herein complained of is set out in the second specification of error, *infra*. To this portion of the charge defendant excepted. (See Trans., p. 245). The defendant requested appropriate charges correcting the error which charges were refused and the defendant excepted. See Trans. pp. 252-254.

The Court did not submit the issue of assault with intent to murder, and of aggravated assault to the jury. (See Main Charge Trans. p. 232 to p. 242. See also Special Charge No. 14, Refused. Trans. p. 258).

ERRORS URGED UPON THIS APPEAL.

1.

The Circuit Court of Appeals erred in not holding that the District Court erred in overruling defendant's motions to quash the indictment and in arrest of judgment, because the indictment did not charge an offense against the laws of the United States, and did not charge an offense within the territorial jurisdiction of the United States, in as much as the indictment, which was based upon the second sub-division of Paragraph Third of Section 272 of the Penal Code, did not charge that the place where the homicide occurred was acquired by the United States for the erection of a fort, magazine, arsenal, dock-yard or other needful building. **Assignments of Error Third to Sixth.** Trans. pp. 270-271.

II.

The Court erred in Paragraphs 10, 11, 13-B, 13-C, 14 and 15 of its charge to the jury, and in submitting the issue of self-defense, wherein it imposed on defendant, though feloniously assaulted, the obligation to retreat before he could exercise his right of self-defense, viz:

CHARGE OF THE COURT ON THE ISSUE OF
SELF-DEFENSE:

"10: Under the plea of not guilty, the defendant is entitled to show, if he can by the evidence, that the homicide was committed in the lawful defense of himself. But, it is necessary to remember, in considering the question of self-defense, that the party assaulted is always under the obligation to retreat, so long as retreat is open to him, provided he can do so without subjecting himself to the danger of death or great bodily harm."

"11: If you believe from the evidence, that the defendant, shot and killed James P. Hermes, at the time when the said James P. Hermes was making an assault upon the defendant, with a dangerous or deadly weapon, that is, with a weapon capable of inflicting death or great bodily harm, and under such circumstances as to put a reasonable man in the position of the defendant in fear of his life, or great bodily harm; and such circumstances would appear to a reasonable mind, as making retreat or attempted retreat dangerous to his personal safety; then the defendant would be justified in standing his ground, and resisting the attack with all necessary force; even to the taking of the life of his assailant; and in such case you would find the defendant not guilty.

"13-B: If, however, you believe from the evidence, that at the time of the killing it would have appeared to a reasonably prudent man, situated as the defendant was, and in the circumstances of the defendant, that the defendant was armed with a deadly or dangerous weapon, and the defendant had reasonable ground to believe that the deceased, from the mode and manner of the use of such weapon, was about to inflict on defendant, or that there was apparent danger of his inflicting upon defendant death or some serious bodily injury; and re-

treat was apparently dangerous, then you are instructed, that under such circumstances the defendant would be justified in resisting the assault with all necessary force, even to the extent of killing the assailant.

13-C: If you believe from the evidence, that previous to the homicide there had been communicated to defendant threats of the deceased to kill defendant or do him serious bodily harm, and that at the time of the difficulty the acts and words of the deceased, accompanied with demonstrations evincing a purpose to put into effect such threats in such a manner as to create in the mind of a reasonable man a reasonable apprehension or fear that the deceased was then and there about to carry such threats into execution and to inflict upon defendant death or serious bodily harm; then you are instructed that the defendant had the right to use such force as would be reasonably necessary to protect himself; provided that he was unable to retreat and avoid the conflict, or that an attempt to do so would have appeared dangerous to a reasonable man under the circumstances of the attack.

14: If you believe from the evidence that at the time of the homicide the deceased made an assault upon the defendant with a deadly weapon, and defendant's knowledge of the character and disposition of the deceased would have caused a reasonable man in the situation of the defendant to have entertained fear of death or serious bodily injury; when retreat or any attempt to retreat would have appeared dangerous to a reasonable man, and that, acting under such reasonable fear, the defendant killed the deceased in repelling the assault, then you should find the defendant not guilty.

15: If the deceased was armed at the time of such assault, and was making such an attack on defendant, with a deadly weapon, as would put a reasonable man in fear of death

or serious bodily harm; then the defendant would be justified in believing that the deceased intended to kill or inflict serious bodily harm upon him, and if retreat would have appeared to a man of reasonable prudence, in the position of the defendant, as involving danger of death or serious bodily harm, then the defendant was entitled to stand his ground, and repel force with force, even to the extent of taking the life of his assailant. Trans. pp. 236-239. To the giving these charges petitioner excepted. Trans. p. 245, and assigned error. See Assignment of Errors No. 24A, 24C, 25, 26, 30, 31, 32 and 33 Trans. 279, 287.

And the Court erred in refusing to charge the jury, though specially requested by Special Instructions Nos. 9 and 10, the converse of the proposition, that if the deceased, at the time of the homicide, was engaged in a felonious assault upon defendant with a deadly weapon, that defendant was not under any obligation to retreat, before he could exercise his right of self-defense, but had the right to stand his ground and resist force with force even to the extent, if necessary, of killing his assailant.

Assignments of Error Nos. 48 and 49, Tr. pp. 290, 291.

III.

The court erred in refusing to submit to the jury Special Charges Nos. 9 and 10, which were as follows:

"Special Charge No. Nine.

"Gentlemen of the Jury:

"The defendant was where he had a right to be when the difficulty arose, and if you believe from the evidence that the deceased advanced upon him in a threatening manner and with a deadly weapon, and defendant at the time had reasonable grounds to believe, and in good faith believed that the deceased intended to take his life, or do him great bodily harm, he was

not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him, in such way and with such force as under all the circumstances he, at the moment, believed and had reasonable grounds to believe was necessary to save his own life, or to protect himself from great bodily injury.

Refused January 18th, 1918.

Wm. B. SHEPPARD, Judge."

Trans. pp. 252-253.

"Special Charge No. 10.

"Gentlemen of the jury:

"The defendant had the same right to act upon the reasonable appearance of danger as upon real danger, and if you should believe from the evidence that the defendant was not in fact in real danger of death or serious bodily injury at the hands of the deceased at the time he killed deceased, but that the defendant reasonably believed he was in danger, and acting upon such belief killed deceased, you should acquit him.

"And you are instructed that if you believe from the evidence that at the time of the killing it reasonably appeared to defendant from his standpoint at the time from the acts of the deceased, that deceased was then and there about to inflict upon him, the defendant, death or serious bodily injury, whether such was the purpose of the defendant or not, and that there was thereby created in the mind of the defendant a reasonable expectation or fear of death or serious bodily injury, then defendant had the right to kill the deceased, and was not required to resort to any other means to repel said attack, nor to retreat in order to avoid the necessity of killing the deceased, and was authorized so to act, whether such danger was real or not, provided it appeared to him, the de-

fendant, to be read, viewed alone from his standpoint at the time.

"Refused January 18th, 1918.

Wm. B. SHEPPARD, Judge."

To the refusal to give said charge defendant excepted. See Trans., p. 253-254 and assigned error. See assignments of Error No. 48 and 49, Trans. 290-291.

IV.

The court erred in not submitting the issue of assault with intent to murder and aggravated assault to the jury, and in refusing special instruction No. 14 on such issues, requested by defendant, which was as follows:

"Gentlemen of the Jury:

"In this case there is evidence that the shot that killed the deceased was the third shot fired by the defendant.

"If you believe from the evidence that such was the case, or if you have a reasonable doubt as to whether he was killed by the third shot, or by the fourth shot, and you should further believe that the fourth shot was fired with malice aforethought, express or implied, but you have a reasonable doubt as to whether the third shot was fired under such circumstances that if death had resulted therefrom it would have been murder, you are, in such event instructed that you cannot find the defendant guilty of any higher grade of offense than assault with intent to murder, for the results of such fourth shot.

Refused January 18th, 1918.

Wm. B. SHEPPARD, Judge."

To the failure to submit such issues defendant excepted Trans., p. 246 and assigned error. See Assignment of Error No. 52, Trans., p. 293.

FIRST POINT:

THE COURT ERRED IN NOT HOLDING THAT THE INDICTMENT UPON ITS FACE DID NOT CHARGE ANY OFFENSE EITHER AGAINST THE LAWS OF THE UNITED STATES, OR WITHIN THE TERRITORIAL JURISDICTION OF THE UNITED STATES.

ARGUMENT.

The indictment as set out in full, pp. 5 to 9 transcript and see pages. 4-3 *supra*, purported to charge petitioner with the offense of murder committed on property conveyed to the United States for its "public purposes." It does not allege the character of the public purposes for which the property was acquired. In other words, it does not charge that the property was acquired for the purposes of the erection of a "fort, magazine, arsenal, dock-yard or other needful buildings," but alleges broadly that the property was acquired for "the public purposes of the United States."

An element of the crime of murder, under Sec. 272, is that the locus of the crime should have been acquired of the United States for one of the express purposes mentioned—

"The crimes and offenses defined in this chapter shall be punished as herein prescribed.
 . . . "Third: . . . When committed within or on any lands reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, or on any place purchased or otherwise acquired by the United States by consent of the Legislature of the State in which the same shall be for the erection of a fort, magazine, arsenal, dockyard, or other needful building."
 (See paragraph Third of Sec. 272).

It was under the second sub-division of paragraph "third" that petitioner was indicted.

This court has said in the case of *United States vs. Hess*, 124 U. S. 483, that

"The general and with few exceptions, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omissions cannot be supplied by *intendment* or *implication*, and the charge must be made directly and not inferentially or by way of recital."

In *United States vs. Cruikshank*, 92 U. S. 542, it was held:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *U. S. vs. Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged;' and in *U. S. vs. Cook*, 17 Wall., 174 (84 U. S. XXI, 539), that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statutes, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.' 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

Again, in *United States vs. Almeida*, Federal Case No. 14,333, the court said:

"It is not enough, and never has been, to charge against the party a mere legal conclusion, as justly inferential from the facts that are not themselves disclosed on the record. You may not charge treason, murder, or piracy, in round, general phrases. You must set out the act which constitutes it in the particular case."

In *United States vs. Staats*, 8 Howard, p. 41, it is stated.

"The general rule is, that the charge must be laid in the indictment so as to bring the case within the description of the offense as given in the statute, alleging distinctly all the essential requisites that constitute it. Nothing is to be left to implication or intendment."

Since one of the elements essential to the punishment of murder under Section 272 is that it shall have been committed on lands acquired by the United States "for the erection of a fort . . . or other needful building," this element is not supplied by the charge that the locus of the crime was acquired by the United States for its public purposes. Public purposes of the United States are no doubt numerous, and property may no doubt be acquired for their exercise, but it is only where the lands on which the homicide is committed has been acquired for certain specific purposes that it becomes punishable as murder under Section 272.

Therefore, we submit that the indictment does not charge an offense against the criminal laws of the United States, and it was error to overrule the motions to quash and in arrest of judgment.

The indictment on its face does not show that the offense was committed within the territorial jurisdiction of the United States and therefore the court erred in not sustaining the motions to quash and in arrest of judgment.

The power of Congress to legislate concerning the places mentioned in Sec. 272 is derived from Art. 1, Sec. 8, Clause 17 of the Constitution. It is as follows:

"The Congress shall have power to exercise exclusive legislation in all cases whatsoever over all places purchased by the consent of the Legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dock-yards and other needful buildings."

It will be noted that the constitutional provision quoted above is narrower than the third paragraph of Section 272, to the extent that it does not contain the clause 'when committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof.'

This is due to the fact that as to all lands, not within the original states, acquired by the United States by treaty or conquest, it had plenary sovereignty, or what is termed areal jurisdiction, and the States could not and did not need to delegate to Congress the power to legislate thereon. As to such territory Congress had inherently as the legislative body of a sovereign nation, the power to legislate over its territory, which did not form part of the States and over which there was no sovereign jurisdiction save that of the national Government.

Congress from time to time, on the creation of new states, and their admission into the Union, reserved complete jurisdiction over certain lands or districts therein. The United States also acquired certain lands by treaty, purchase or conquest for its exclusive use. These are some of the areas alluded to as "reserved or acquired" in the first subdivision of Paragraph Third of Sec. 272, as distinguished from tracts ceded to the United States by the States for certain express purposes described in the second subdivision of such third paragraph of Section 272. This distinction was recognized by the Circuit Court of Appeals in its opinion herein, saying that "jurisdiction in the Federal Court was claimed by the Government under the following part of the third subdivision of Section 272:

"On any place purchased or otherwise acquired by the United States by consent of the Legislature of the State in which the same shall be for the erection of a fort, etc."

United States vs. Tully, 140 Fed., p. 900.

See Chaplin's *Principles of Federal Law*, pp. 51 to 77, Sec. 79.

Power to legislate over the offense of murder of one private citizen by another is vested in Congress by Section 8, Art. I, for murder is not an offense against the authority of the United States, only as it may occur within the territorial jurisdiction thereof. *United States vs. Ward*, 28 Federal Cases, No. 16639.

United States vs. Stahl, 1 Woolw. 194.

We submit that territorial jurisdiction over the offense charged must appear upon the face of the indictment and in the absence of appropriate allegations of fact showing such jurisdiction the defect can not be cured by intendment or judicial notice.

In *United States vs. Davis*, 5 Mason, 535, Fed. Cas. No. 14,730, page 783, it was said that the court could take judicial notice of a statute ceding jurisdiction of a place for a Marine Hospital. However Justice Story continued:

"We cannot judicially know that the place described in the indictment was purchased under the authority of that statute."

"It should not be left in doubt, or to mere inference from the words of the indictment whether the offense charged was within Federal cognizance." *Blitz vs. U. S.* 38 Law. Ed. p. 727.

"There must be an affirmation and distinct charge in the indictment. It is a familiar rule of criminal pleading and practice that nothing is taken by intendment. The facts must be charged and charged distinctly." Justice Brewer in *U. S. vs. Morrissey*, 32 Fed. 151.

In *Early vs. Commonwealth*, 24 S. E. 236 (Ga.) the indictment averred the offense was committed "within the jurisdiction of the court." The Supreme Court of Georgia passing on the sufficiency of the allegations said:

"Jurisdiction is said to be a matter of law, the place where the crime was committed a matter of fact. It is necessary to aver and prove the place where the crime was committed. It is not sufficient to aver as is done in this indictment that the offense was committed 'within the jurisdiction of the court,' which is a conclusion of law, but the indictment should have stated the facts, which gave the court jurisdiction. The demurrer to the indictment should have been sustained.

"An allegation in an indictment that the crime 'was committed within the jurisdiction of the court' is not an averment of fact, but a mere statement of a conclusion of law." *State vs. Carlson*, 62 Pac. Rep. 1019; *Johnson vs. State*, 58 S. E. Rep. 265.

The case of *United States vs. Lewis*, 36 Federal Rep. p. 449, was a prosecution under Section 5346 R. S. which provided that "every person who, upon the high seas * * * within the admiralty jurisdiction of the United States * * * on board any vessel belonging in whole or in part to the United States or any citizen thereof with a dangerous weapon * * * * commits an assault on another shall be punished," etc.

The information charged that the offense was committed on the high seas, but there was no allegation that it was committed on an American vessel. On motion to quash jurisdiction was claimed by reason of subdivision 1 of Section 563 of Revised Statutes, which gave district courts jurisdiction "of all crimes and offenses cognizable under the authority of the United States committed within their respective districts or upon the high seas, the punishment of which is, not capital, except," etc. The District Court, in passing upon the motion, said:

"It is long since settled that the courts of the United States have no common law, jurisdiction in criminal cases so far as the United States are concerned, there are no common law crimes; and that therefore its courts cannot take cognizance of any act or omission as a crime unless it has been made such by an act of Con-

greas. U. S. vs. Hudson, 7 Cranch, 32; U. S. vs. Bevens, 3 Wheat, 336.

"The only act of Congress making an assault on the high seas with a dangerous weapon a crime, is Section 5346 of the Revised Statutes (Section 4 of the Act of 1825); and one of the elements of the crime, as therein defined, is that the assault must take place on board of a vessel belonging in whole or in part to the United States or some citizen thereof. The information does not disclose the nationality of the vessel on which the alleged assault took place. To constitute a crime against the United States of which this court has jurisdiction, the assault must have taken place on board an American vessel, and that fact must be alleged in the pleading."

In the case of the Franklin vs. United States, 1 Colorado, p. 35, defendant was charged by indictment with the offense of murder committed "at the County of Gilpin. On appeal from a judgment of conviction and sentence of death, the indictment was attacked. One of the grounds upon which the Government relied to uphold the indictment was that Gilpin County was in fact in the Indian County at the time of the homicide, and that therefore, the indictment came within the terms of the act of April 30, 1790, which was as follows:

"If any person shall, within any fort, arsenal, dock-yard, magazine or any other place or district of county, under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or persons, on being convicted thereof, shall suffer death."

The court said:

"The principal question presented in this record is whether the place, where the crime was committed, was at the time of the offense within the descriptive terms of this act so as to give the district court jurisdiction of the offense. The indictment set forth that the crime was committed "at the Court of Gilpin" without further description of the place. If the act operates in the territories in the same way as in the several states, and to no greater extent; in other words, if the act operates in this territory, only within forts, arsenals, and other places, where the United States have exclusive jurisdiction in virtue of exclusive

ownership, it seems to be necessary under the act to aver in the indictment and prove upon the trial that the place is within the descriptive terms of the statute, and at page 43 *id.* the court said: "It was also said at the time of the offense Gilpin County was in fact in the Indian country. If so, the fact should have been averred in the indictment, and in the absence of such averment the court could not take jurisdiction upon that ground.

See also *U. S. vs. Stahl*, 1 Weol, 194. Opinion by Mr. Justice Miller.

OTHER AUTHORITIES.

"The Constitution clearly implies the permanent use of the property purchased for the construction or erection of some of the structures designated or some other needful building. The right of exclusive jurisdiction can be acquired only by the United States in the mode pointed out by the constitution * * * * where the lands were purchased by the United States by the consent of the State for one of the specific and enumerated purposes." *U. S. vs. Tierney* 28 Fed. Cas. 16517.

"It is not competent for the Legislature to abdicate its jurisdiction over its territory, except where the lands are purchased by the United States for the specific purpose contemplated by the Constitution. The rule that legislative consent operates as a complete cession is applicable only to objects which are specified in the above provision." *In re Kelly* 71 Fed. 545.

In *U. S. vs. Hopkins*, Fed. Cas. No. 15,387-A, the facts were that the State of Georgia had ceded jurisdiction to the United States only in places purchased by the United States for forts or fortification: (Syllabus by the Court). "The Federal Court had no jurisdiction over land purchased and used for purposes of an arsenal."

"The consent of the States to the purchase of lands within

them for the special purposes named is, however, essential under the Constitution to the transfer to the general government with the title, of political jurisdiction." *Id.*

The case of *Peyroux vs. Howard*, 7 Peters, 331, is authority for the proposition that where the jurisdiction of the court depends upon facts in pais the limits of such territorial jurisdiction will not be judicially noticed, unless the boundaries thereof are of such notoriety that they may be judicially noticed as other notorious facts. In the case mentioned the admiralty jurisdiction of the court at New Orleans depended upon whether or not the tide in the Mississippi ebbed and flowed as high up the river as New Orleans. The court said that this was an issue of fact, and declared that whether it could be judicially noticed depended upon the fact whether the ebb and flow of the tide at that point was notorious, and in this regard said:

"It certainly cannot be laid down as a universal, or even as a general proposition, that the court can judicially notice matters of fact. Yet it cannot be doubted that there are many facts, particularly with respect to geographical positions, of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof, which the court may judicially notice."

The case of *United States vs. Jackalo*, decision by Mr. Justice Nelson, 66 U. S. pp. 484-488 is another case in point.

The indictment charged that the offense was committed in waters within the admiralty and maritime jurisdiction, on board of an American vessel called the "Spray." Jurisdiction of the United States court depended upon, whether the

offense was committed out of the jurisdiction of any of the States. There was a special verdict, finding that the offense was committed upon the "Spray," and also finding where the "Spray" was lying at the time, "by metes and bounds." It was left to the court to determine whether the place thus described was within the jurisdiction of the state. The Supreme Court of the United States said:

"We have not referred to this boundary for the purpose of determining it, or even expressing an opinion upon it, but for the purpose of saying the boundary of the State, when a material fact in the determination of the extent of jurisdiction of the court, is not a simple question of law. The description of a boundary may be a matter of construction, which belongs to the court; but the application of the evidence in the ascertainment of it, as thus described and interpreted, with a view to its location and settlement, belongs to the jury. We do not think the special verdict in this case furnished ground for the court to determine whether or not the offense was committed out of the jurisdiction of the State."

The case of *People vs. Collins*, decided by the Supreme Court of California, reported in the 39th Pacific, page 17, is in point. Therein the court held:

"The mere ownership by the United States of land or property within the county does not show any Federal jurisdiction over crimes committed upon it, as that fact does not oust the jurisdiction of the State; but the ownership must be acquired by purchase, with the consent of the Legislature, which is held to include the acquisition of property by eminent domain when that proceeding is authorized by the Legislature. *U. S. vs. Cornell*, 2 Mason, 60 Fed. Cas. No. 14,867; *U. S. vs. Jones*, 109 U. S. 513, Sup. Ct. 346. The Federal jurisdiction, therefore, involved a question of fact, viz—a purchase by the United States, or the acquisition of property by a proceeding to condemn it, and of such question courts will not take judicial notice. It is a matter of common knowledge that the United States occupies buildings for custom house, postoffice, and other purposes; but whether such buildings have been purchased by

the United States, or whether they are occupied under leases from private owners is a matter to be proved by the record of the conveyances. The information in question conforms to the statutory precedent given in section 951 of the Penal Code, in the particular under discussion, and as this court cannot, as a matter of law, say that the Federal courts have exclusive jurisdiction over any part of the city and county of San Francisco, the jurisdiction of the court is sufficiently alleged, and the objection here urged is not based on any evidence tending to show that the court did not, in fact, have jurisdiction. The exceptional character of the Federal jurisdiction is further shown by the precedents used in the Federal courts, which allege, not only that the place where the offense was committed was within the jurisdiction of such court, but that it was not within the jurisdiction of any State. What has been said points out the distinction between this case and the case of *People vs. Wong Wang*, 92 Cal. 281, 28 Pac. 270. There the offense was a misdemeanor, over which, if committed in the city of Los Angeles, the police court had exclusive jurisdiction, and as such jurisdiction was given by law, and therefore must be judicially noticed, it did not appear upon the face of the information that the superior court had jurisdiction, since its jurisdiction depended upon a fact which did not appear, namely, that it was committed in that part of the county outside of the city. The motion in arrest of judgment in the case at bar was properly denied."

The cases cited by the Circuit Court of Appeals relied upon by the Circuit Court of Appeals are not in point.

The case of *Jones vs. the United States*, 137 United States, 202-224, relied upon by the Circuit Court of Appeals, is not in point. There the facts were that under the laws of the United States, an unclaimed island in the Carribean Sea had been taken possession of by a citizen of the United States on behalf of the Government on the ground that it contained a guano deposit. The indictment alleged the necessary facts to show that the offense was committed within the territorial jurisdiction of the court. The indictment is a substantial copy of the

language of Sec. 5570 of the Revised Statutes, which, read in connection with Sec. 5576, fixed criminal jurisdiction under the old law. The elements of territorial jurisdiction as fixed by that statute, and as incorporated in the indictment, were:

FIRST—That the offense was committed on an island recognized by the United States as containing a deposit of guano.

SECOND—That such island had been recognized and considered by the United States as appertaining to the United States.

The allegation in the indictment in this case that the place had been ceded to the United States under the Texas statutes for the public purposes of the United States, is ambiguous and a conclusion of the pleader. The statement that the cession was made for the public purposes of the United States is necessarily ambiguous, because there are many public purposes of the United States, that do not come within those defined by the Constitution, Art. 1, Sec. 8, paragraph 17. Yet, this is the only allegation in the indictment upon which jurisdiction is endeavored to be sustained.

In the case of *United States vs. Holt*, 218 U. S. 245, the indictment contained the allegation that the offense was committed within the **Fort Warden Military Reservation**. This was a place (viz: a fort) within the express terms of Sec. 272. There is no such allegation in this case. Here we have the ambiguous expression that it was a place, jurisdiction over which had been ceded to the United States for its public purpose.

According to the decision rendered herein, in an indictment for murder, notwithstanding the fact that the place where the homicide occurred must have been acquired for a specific purpose as a jurisdictional element of the crime it is

not necessary to allege any fact save that the offense was committed within certain metes and bounds. The court will then take judicial knowledge (a) that the United States acquired it for one of the purposes mentioned in the Constitution and statutes; (b), that the State of Texas ceded jurisdiction over the place for such particular purpose.

SECOND POINT.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT PLAINTIFF IN ERROR, THOUGH IN A PLACE WHERE HE HAD A RIGHT TO BE AND THOUGH THE DECEASED WAS MAKING A FELONIOUS ASSAULT UPON HIM, WITH INTENT TO KILL HIM, OR DO HIM SOME SERIOUS BODILY INJURY, WAS OBLIGED TO RETREAT, THOUGH WITHOUT FAULT ON HIS PART, TO THE DITCH OR WALL BEFORE HE COULD EXERCISE HIS RIGHT OF SELF-DEFENSE, AND SLAY THE DECEASED.

ARGUMENT.

In the decision of the Circuit Court of Appeals, it is declared—

(a): "The defendant was rightfully where he was at the time of the quarrel, but was not on his own premises."

(b): "A tendency of the evidence was to the effect that the deceased, Hermes, approached defendant, an open knife in his hands, with which he attempted to strike defendant. The evidence without conflict, showed that defendant on the approach of Hermes, retreated twenty or twenty-five feet to where he had left his rain-coat, in which was his pistol, and after obtaining his pistol from it, stood his ground, using his pistol with fatal effect."

See opinion of Circuit Court of Appeals, Tr. of Rec. pp. 321-322. The trial court charged the jury that it was the duty of defendant to retreat before he could resist force with force. (Tr. of Rec., pp. 236 to 238).

Paragraph 10 of the main charge was as follows:

"Under the plea of not guilty, the defendant is entitled to show, if he can by the evidence, that the homicide was committed in the lawful defense of himself, but it is necessary to remember in considering the question of self-defense, that the party assaulted is always under the obligation to retreat, so long as retreat is open to him; provided he can do so without subjecting himself to the danger of death or great bodily harm."

By Paragraphs 11 to 15 of the main charge, inclusive, the court reiterated to the jury that the obligation rested upon defendant to retreat notwithstanding he was feloniously assaulted before he could exercise his right of self-defense. The defendant excepted to these charges.

Appropriate charges were requested by defendant, instructing the jury that if defendant was feloniously assaulted, while at a place where he had a right to be, without fault upon his part, he had a right to stand his ground and resist force with force to the extent of slaying his assailant. These charges were refused. To this action of the court defendant excepted. See Charges Nos. 9 and 10, requested by defendant and refused. (Tr. of Rec. pp. 252-253).

These rulings were affirmed by the Circuit Court of Appeals.

The Circuit Court of Appeals relies upon the decision in *Alien vs. United States*, 164 U. S., p. 492. We submit that the decision in that case is not applicable to this case.

The Circuit Court of Appeals denied the right of petition.

er to stand his ground, though in the right, on the sole ground that he was not on his own premises. We submit that this rule is not in accord with reason, and is not in accord with the law on the subject.

In determining whether defendant was compelled to retreat to the wall, before he could exercise his right of self-defense and kill his assailant, who was making a felonious assault upon him with a knife, resort must necessarily be had to the decisions of this court as also to the early common law of England, as this duty to retreat is not declared by the Federal law as an element of self-defense, and exists, if at all, as a part of the early common law, to which the Federal courts resort to ascertain the elements of any crime not declared by statute. We may, therefore, look to the early English authors and statutes to ascertain what the common law of England was at the time of the American Revolution on this subject.

The decisions of the states are in hopeless conflict. Some of the states have developed as their own common law "the rule of flight." The majority of the states, however, follow the rule of the early common law of England of "stand ground when in the right."

We submit that this court will not follow the common law of the states, but of England in determining the elements of the right of self-defense.

DUTY TO RETREAT—IT DID NOT EXIST IN CASES OF JUSTIFIABLE HOMICIDE OR JUSTIFIABLE SELF-DEFENSE AT THE COMMON LAW.

There is direct conflict in the decisions of the states on the subject. The cases are divided into two classes, those which hold to what is termed the "flight rule," and the others to what is termed "stand ground when in the right rule."

The early common law has always been recognized by the

United States courts as a part of the body of the criminal law of our government insofar as resort must be had to it to supply any failure upon the part of the statutes in defining the ingredients of an offense or the elements that must enter into it in order to make an act criminal.

In the case of *United States vs. Palmer et al*, 3 Wheaton, p. 613, the second question presented to the court was whether the crime of robbery mentioned in the eighth section of the [redacted] Congress is the crime of robbery, as recognized and [redacted] at the common law. Replying to this question, Chief Justice Marshall said:

"The second question proposed in this case is one on which I presume there can be no doubt, for the definition of robbery under this act we must look for the definition of the terms in the common law."

In the case of *United States vs. Smith*, 5 Wheaton, p. 160, Justice Storey said:

"When the act of 1790 declares, that any person who shall commit the crime of robbery, or murder, on the high seas, shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definition of these terms as they are found in our treaties of the common law. In fact, by such a reference, the definitions are necessarily included as much as if they stood in the text of the act. In respect to murder, where "malice aforethought" is of the essence of the offense, even if the common law definition were quoted, in express terms, we should still be driven to deny that the definition was perfect, since the meaning of "malice aforethought" would remain to be gathered from the common law. There would then be no end to our difficulties, [redacted] definition, for each would involve some term which might still require some new explanation."

Again in *Pettibone vs. United States*, 143 U. S. 233, Mr. Chief Justice Fuller said:

"The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws or treaties of the United States, but they resort to the common law for the definition of terms by which offenses are designated."

The common law referred to is the law of England as it existed prior to the American Revolution. See 12 *Corpus Juris*, p. 198, declaring that English decisions rendered prior to the Revolution are usually considered conclusive evidence of what the common law is. In the same paragraph, the writer declares that the early standard works on the subject of the common law are strong evidence of what it was.

We assert that the early common law, as declared by all of the standard authors on criminal law, is identical with what is termed the "stand ground when in the right rule."

THE EARLY COMMON LAW.

(1): A person who was feloniously assaulted, and not himself in fault, could exercise his right of self-defense without the necessity of retreating to the wall whenever he was at a place where he had a right to be.

(2): If the assault was not felonious, or the difficulty arose in an affray or sudden encounter, and in the course thereof, it became necessary for the slayer to kill his assailant, then before he would be justified in doing so, he must retreat to the wall.

In short, it was the difference between justifiable self-defense and excusable self-defense, corrolaries respectively of "justifiable homicide," and "excusable homicide."

It seems to us that the confusion or rather the conflict in decisions as to whether or not, at the early common law, one who was feloniously assaulted by another was compelled to retreat, before he could exercise his right of self-defense,

is due to the fact that this distinction between excusable or justifiable homicide has never been, or at least in but few cases, clearly recognised. The clearest distinction between these two grades of homicide is made in third American edition of Russell on Crimes, page 508 et seq.

It is very clear from the text of this work that the duty to retreat was only imposed in the case of excusable homicide, and never in the case of justifiable homicide. It must be noted too, that the author cites in support of the text, Hale, East, Foster et al. In justifiable homicide, this duty of retreat was not imposed upon a party assaulted feloniously by another in an effort to commit a known felony upon him, such as murder, robbery, rape, arson and the like. Excusable homicide was divided into two sorts, either *per infortunium*, by misadventure, or *se et sua defendendo*. We are not concerned with the first sort. The last sort or subdivision has been mistakenly treated as homicide in true self-defense, due, no doubt to a literal translation of the Latin phrase. As a matter of fact excusable homicide *se et sua defendendo* was not homicide in true or perfect self-defense, at the common law, but was homicide in a chance medley or sudden encounter where an element of blame attached to the slayer and according to Lord Coke, under such circumstances at the common law, the defendant would have suffered death, but under the statute of Gloucester he was pardoned at the forfeit of his goods and chattels.

In all cases of excusable homicide, the slayer was assaulted suddenly, but not feloniously, or the necessity for the homicide arose in an affray or sudden encounter, in which the slayer was not an entirely unwilling participant, therefore not entirely blameless. The common law required that the person under such circumstances who killed another in his

own self-defense (*se et sua defendendo*) should have retreated as far as he could conveniently to avoid the violence of the assault before he turned upon his assailant.

A wise provision, for the assaulted party was not entirely blameless—this principle is yet incorporated in the laws of all the states, in the general rule, that in mutual altercations there must be abandonment by the slayer of the difficulty before his right to kill in self-defense arises.

In the case of justifiable homicide, however, the rule was entirely different.

There are several phases of justifiable homicide, such as homicide by execution, homicide by officers killing in the course of arrests, officers dispersing mobs in cases of riots etc., and the class of homicides with which we have to deal which was termed, by Russell, homicide in the prevention of any forcible and atrocious crime. This class is placed by him on the same basis of freedom from blame as the first three. The rule laid down (Russell on Crimes, 3rd American Ed., at page 519) on the right to defend one's person against violence is stated as follows:

"A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends and endeavors, by violence, or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable. But it has been holden, that this rule does not apply to any crime unaccompanied with force, as picking of pockets. It seems, therefore, that the intent to murder, ravish, or commit other felonies attended with force or surprise, should be apparent, and not left in doubt; so that if A makes an attack upon B, it must plainly appear by the circumstances of the case (as the manner of the assault, the weapon, etc.) that the life of B is in imminent danger, otherwise his killing the assailant will not be justifiable self-defense.

"Excusable homicide is of two sorts; either per infortunium, by misadventure, or *se et sua defendendo*, upon a principle of self-defense. The term excusable homicide imports some fault in the party by whom it has been committed, but of a nature so trivial that the law excuses such homicide from the guilt of felony, though in strictness it deems it to be deserving of some degree of punishment. It appears to be the better opinion, that the punishment inflicted for this offense was never greater than a forfeiture of the goods and chattels of the delinquent, or a portion of them, and, from as early a time as our records will reach, a pardon and writ of restitution of the goods and chattels have been granted as a matter of right, upon payment of the expenses of suing them out.

"Excusable homicide in self-defense is a sort of homicide committed *se et sua defendendo*, in defense of a man's person or property, upon some sudden affray, considered by the law as in some measure blameable, and barely excusable." *Id.* 519 et seq.

"When a man is assaulted in the course of a sudden brawl or quarrel, he may, in some cases, protect himself by killing the person who assaults him, and excuse himself on the ground of self-defense. But, in order to entitle himself to this plea, he must make it appear, first, that before a mortal stroke given he had declined any further combat; secondly, that he then killed his adversary through mere necessity, in order to avoid immediate death. Under such circumstances, the killing will be excusable self-defense, sometimes expressed in the law by the word *chance medley* (and it has been written by some *chaud medley*), the former of which in its etymology, signifies a casual affray; the latter an affray in the heat of blood, or passion. Both of them are pretty much of the same import; but the former has, in common speeches, been often erroneously applied to any manner of homicide, whereas it appears by one of the statutes, and the ancient books, that it is properly applied to such killing as happens in self-defense upon a sudden encounter.

"Homicide upon *chance medley* borders very nearly upon man-slaughter, and, in fact and experience, the boundaries are in some instances scarcely perceivable, though in consideration of law they have been fixed. In both cases it is supposed that passion had kindled on each side, and

blows have passed between the parties; but in the case of man-slaughter, it is either presumed that the combat on both sides had continued to the time the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death. And the true criterion between them is stated to be this: When both parties are actually combating at the time the mortal stroke is given, the slayer is guilty of man-slaughter; but if the slayer has not begun to fight, or having begun endeavors to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defense."

"In all cases of homicide excusable by self-defense, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or with malice; and from the doctrine which has been above laid down, it appears that the law requires, that the person who kills another in his own defense should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood (1 Russell on Crimes, 3rd American Ed., pp. 508-515).

JUSTIFIABLE HOMICIDE.

In Section 3, Subject—Justifiable Homicide, page 316-521,

1 Russell on Crimes, 3rd American Ed.:

"It has been clearly stated that justifiable homicide is of several kinds, as it may be occasioned by the performance of acts of unavoidable necessity, or by acts done by the performance of the law." P. 516.

"A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable."

"And the rule clearly extends only to cases of felony, for if one comes to beat another, or to take

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his goods merely as a trespasser though the owner may justify the beating of him, so far as to make him desist, yet if he kills him, it is man-slaughter. But if a house be broken open, though in the daytime, with a felonious intent, it will be within the rule."

* * * * *

"The rule in the case of justifiable self-defense, according to Foster (see Post. C. L. 273), does not require retreat by a party feloniously assaulted. The author says:

"In the case of justifiable self-defense the injured party may repel force by force in defense of his person, habitation, or property against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable."

Lord Coke (3 Institutes, page 55), speaking of a case of a common assault of A upon B in a mutual combat, says:

"If in the course of such fighting together A giveth back until he cometh to a hedge, wall, or other strait beyond which he can not pass, and then, in his own defense and for safeguard of his own life, killeth the other; this is voluntary, and yet no felony, and the jury that finds that was se defendendo, ought to find the special matter. And yet such a precious regard the law hath of the life of man, that the case be inevitable, that at the common law, he should have suffered death, and, though the statute of Gloucester save his life, yet he shall forfeit all his goods and chattels."

The author then makes the same distinction in regard to retreat in justifiable self-defense contended for by petitioner herein, saying:

"Some, without giving back to a wall, etc., or other inevitable case, as if a thief offer to rob or murder B either abroad or in his house, and thereupon assault him, and B defends himself without giving back, and in defense killeth the thief, this is no felony." Cokes 3 Institutes, p. 56.

"Regularly it is necessary that the person that kills another in his own defense fly as far as he may to avoid the violence of the assault before he turn upon his assailant * * * * but this has some exceptions.

"One in respect of the person killing, second in respect to the person killed. If a thief assaults a true man, either abroad or in his house to rob or kill him, the true man is not bound to give back, but may kill his assailant, and it is not felony." Hales Pleas of the Crown Chap. 40.

It must be noted, as said by Mr. Russell in his work with respect to the statute of Henry 8, Chap. 5, that this illustration of the principle is not exclusive of other instances of justifiable homicide, but rather illustrative of the fact that where a felonious assault is made abroad upon B with the intent of murdering him, not solely for the purpose of theft, but out of any wanton malice aforethought, B's right to stand his ground and kill his assailant was conferred by the law, and such killing was not felony, and the slayer forfeited nothing.

In Foster's Crown cases, C. 8, p. 273 et seq., published in 1762, the rule is thus stated:

"The writers on the common law, who, I think, have not treated the subject of self-defense with due precision, do not, in terms, make the distinction I am aiming at; yet all agree ~~that~~ there are cases in which the man may, without retreating, oppose force to force, even to the death. This I call justifiable self-defense. They, justifiable homicide. They likewise agree that there are cases in which the defendant can not avail himself of the plea of self-defense without showing that he retreated as far as he could with safety, and then, merely for the preservation of his own life, killed the assailant. This I call self-defense, culpable, but, through the benignity of the law, excusable. In the case of justifiable self-defense, the injured party may repel force with force in defense of his person, that habitation or property against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit a known felony upon either. In these cases he is not obliged to

retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable."

Mr. East, in his *Treaties on the Pleas of the Crown*, (published in 1803), at page 271, says, in speaking of homicide from necessity, makes the clear distinction in terms:

"Herein may be considered, 1—What sort of attack it is lawful and justifiable to resist, even by the death of the assailant, and where the party is without blame. 2—Where such killing is only excusable, or even culpable, and the party is not free from blame," etc.

In relation to the first sort, the author says:

"1: A man may repel force with force, in defense of his person, habitation or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kills him in so doing, it is called justifiable self-defense."

In *Hawkin's Pleas of the Crown*, 7 Ed. Vol. 1, the author in speaking of justifiable homicide, at page 172, says:

"Of justifiable homicide of a private nature, in the just defense of a man's person, house or goods, I shall show, first, in what cases the killing of a wrong-doer may be justified by reason of such defense. Secondly, where the killing of an innocent person may be so justified.

"Sec. 21. And first, the killing of a wrong-doer, in the making of such defense, may be justified in many cases, as where a man kills one who assaults him in the highway to rob or murder him; or the owner of a house, or any of his servants or lodgers, etc., kill one who attempts to burn it, or to commit in it murder, robbery or other felony (a): or a woman kills one who attempts to ravish her (1) or a servant coming suddenly and finding his master robbed and slain, falls upon the murderer immediately and kills him; for he does it in the height of his surprise, and under just apprehension of the like attempt upon himself; but

in other circumstances he could not have justified the killing of such an one, but ought to have apprehended him, &c.

"Sec. 24: And I can see no reason why a person who without provocation is assaulted by another in any place whatsoever, in such a manner as plainly shows an intent to murder him, as by discharging a pistol, or pushing him with a drawn sword, etc., may not justify killing such an assailant, as much as if he had attempted to rob him; for is not he who attempts to murder more injurious than he who barely attempts to rob me? And can it be more justifiable to fight for my goods than for my life? And it is not only highly agreeable to reason that a man in such circumstances may lawfully kill another, but it seems also to be confirmed by the general tenor of our law books; which, speaking of homicide *se defendendo*, suppose it is done in some quarrel or affray. From whence it seems reasonable to conclude, that where the law judges a man guilty of homicide *se defendendo* there must be some precedent quarrel in which both parties always are, or at least may justly be supposed to have been, in some fault, so that the necessity to which a man is at length reduced to kill another, is in some measure presumed to have been owing to himself; for it cannot be imagined that the law, which is founded on the highest reason will adjudge a man to forfeit all his goods, and put him to the necessity of purchasing his pardon, without some appearance of a fault. And though it may be said that there is none in chance medley, and yet that the party's goods are also forfeited by that, I answer, that chance medley may be intended to proceed from some negligence, or at least want of sufficient caution in the party who is so unfortunate as to commit it; so that he doth not seem to be altogether faultless. Besides, one of the reasons given in our law books for which homicide *se defendendo* forfeits goods, is because thereby a true man is killed; but it seems absurd, that he who apparently attempts to murder another, which is the most heinous of all felonies, should be esteemed such, when those who attempt other felonies, which seem to be much less criminal, are allowed to be killed as downright villains, not deserving the protection or regard of the law."

"And by 24 Hen 8, c. 5 it is recited, 'forasmuch as it hath been in question and ambiguity, that if any evil-disposed person or persons do attempt feloniously to rob or murder any person or persons in or nigh any common highway, cartway, horseway, or footway, or in their mansions, messuages, or dwelling places; or that feloniously do attempt to break open any dwelling house in the nighttime; should happen, in the prosecution of such felonious intent, to be slain by him or them whom the said evil-doers should so attempt to rob or murder, or by any person or persons being in their dwelling house, which the same evil-doers should so attempt burglarily to break by night, if the said person so happening in such cases to slay the offender so attempting to commit murder or burglarly should forfeit or lose his goods or chattels for the same, as any other person should do that by chance medley should happen to kill another in his or their defense.'" For the declaration of which ambiguity and doubt it is enacted, 'That whoever shall be indicted or appealed of or for the death of such evil-disposed person or persons attempting to murder, rob, or burglarily to break mansion houses as aforesaid, shall not forfeit any lands, tenements goods or chattels, but shall be thereof, and for the same, fully acquitted and discharged.'"

Bishop, at Section 850, in his *New Criminal Law* (1892) distinguishes the case where retreat to the wall is required, saying:

"3: Retreating 'to the wall'—These cases of mere assault, and cases of mutual quarrel, where the attacking party has not the purpose of murder in his heart, are those to which is applied the doctrine of the books that one cannot justify the killing of another, though apparently in self-defense, unless he retreated 'to the wall,' or other interposing obstacle before resorting to this extreme right. But—

"4: Murder Meant—Deadly Weapon. Where an attack is made with murderous intent, there being a sufficient overt act, the person attacked is under no duty to fly; he may stand his ground, and if need be kill his adversary. And it is the same where the attack is with a deadly weapon; for in this case the person attacked may well as

sume that the other intends murder, whether he does in fact or not."

Under paragraph Three the author cites Hale's P. C. 479, 481; 4 Bl. Com. 185; under paragraph four, 3 Coke's Institute, 55-56; Foster, 273; 1 East P. C., 271.

At Section 951, Mr. Bishop declares that not only does one have the right to resist a murderous assault, but it is his duty to do so, and if he flies, he commits substantially the offense of misprision of felony.

"2: Law of Misprision—When one witnesses an attempt to commit a felony, the duty comes to him immediately to resist it; inasmuch that as we have seen, if he merely declines this duty, he is guilty of an indictable misdemeanor, called misprision of felony. Therefore if a man murderously attacked by another flies instead of resisting, he commits substantially this offense of misprision of felony; even though we should admit that in strict law he will be excused because acting from the commendable motive of saving life. While, on the other hand, if he flies from one intending merely a battery, he is in no way amenable either to the letter or spirit of a broken law."

Out of this duty to resist a felony arose the doctrine that one had the right to stand his ground against a murderous assault according to many authorities.

From the foregoing it would seem that the early law writers on the subject are all in accord. We will now consider the decisions of this court.

In the case of *Beard vs. United States*, 158 U. S. 550, the Supreme Court in effect declared that the rule contended for herein was correct, and that the defendant did not have to retreat, when assaulted feloniously. This is apparent from the reasoning of the court throughout the decision.

In that case this court reviewed both the theory of retreat and of standing ground, and discussed at length and approved

the Erwin case, 29th Ohio State, 186, in which the Supreme Court of Ohio reversed the judgment of the trial court, because it charged that it was the duty of the defendant to retreat. In the course of his opinion Justice Harlan said:

"Upon a full review of the authorities and looking to the principles of the common law, as expounded by writers and courts of high authority, the Supreme Court of Ohio held (*Erwin vs. State*, 29 Ohio State, 186) that the charge was erroneous, saying: 'It is true that all authorities agree that the taking of life in defense of one's person cannot be either justified, or excused, except on the ground of necessity; and that such necessity must be imminent at the time; and they also agree that no man can avail himself of such necessity if he brings it upon himself. The question then is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself on the ground that he failed to fly from his assailant when he might safely have done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass; or even to save life where the assault is provoked; but a true man who is without fault is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or do him enormous bodily harm. Now, under the charge below, notwithstanding the defendant may have been without fault, and so assaulted, with the necessity of taking life to save his own upon him; still the jury could not have acquitted if they found he failed to do all in his power otherwise to save his own life, or prevent the intended harm, as retreating as far as he could, etc. In this case we think the law was not correctly stated.'" 158 U. S., pp. 557,560.

Justice Harlan in the same case quoted approvingly the following passage from *Runyan vs. State*, 57 Ind. 80, 83, 26 Am. Rep. 52:

"A very brief examination of the American authorities make it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can, before he is justified in

repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defense. The weight of modern authority, in our judgment, establishes the doctrine that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant, is killed, he is justifiable. It seems to us that the real question in the case, when it was given to the jury, was whether the defendant, under all the circumstances, was justified in the use of a deadly weapon in repelling the assault of the deceased. We mean by this, did the defendant have reason to believe, and did he in fact believe, that what he did was necessary for the safety of his own life or to protect him from great bodily harm. On that question the law is simple and easy of solution, as has been already seen from the authorities cited above.

The earliest expression we have on the question of retreat is in charge given by Associate Justice Bushrod Washington, while on circuit in a capital case in 1790. *United States vs. Wiltberger*, Case No. 16,938, 28 Federal Cases, p. 728, 3 Wash. C. C. 505.

Mr. Justice Washington's charge on the issue of self-defense was:

"As to this, the law is, that a man may oppose force to force, in defense of his person, his family, or property, against one who manifestly endeavors, by surprise, or violence, to commit, a felony, as murder, robbery, or the like. In this definition of justifiable homicide, the following particulars are to be attended to," etc.

A comparison of this charge with the language at page 273 of *Foster's Crown Cases*, shows that Mr. Justice Washing-

ten took his charge from Foster's statement of the law, which is as follows:

"In the case of justifiable self-defense the injured party may repel force by force in defense of his person, habitation or property against one who manifestly intendeth and endeavorth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable."

It is substantially the same as the declaration by Mr. East on the law of the subject in his Pleas of the Crown at page 271, stating the rule to be as follows:

"A man may repel force by force, in defense of his person, habitation or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kills him in so doing, it is called justifiable self-defense."

Mr. Justice Field in the case of *United States vs. Outerbridge*, 5 SAWY, 620, 27 Federal Cases, No. 15,978, again states the same rule, (note that it is identical with the language used by East, *supra*), and quotes the *Wiltberger* case in support, thereof, saying:

"Now upon this subject of justification the law is explicit. A man may repel force by force in the defense of his person, his family or property, against any one who manifestly endeavors by violence or surprise to commit a felony, as murder, robbery, or the like. The right to oppose force to force in such case is founded upon the law of nature, and is not and can not be superseded by the law of society."

In this case petitioner was denied the right to repel force with force, but was required to retreat before an unlawful attack.

Mr. Wharton says:

"A man may repel force by force in defense of his person, habitation, or property, against one or many who manifestly intend and endeavor, by violence or surprise, to commit a known felony on either. In such a case he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and, if in a conflict between them, he happens to kill, such killing is justifiable. The right of self-defense in cases of this kind is founded on the law of nature; and is not, nor can it be superseded by any law of society. . . . The right extends to the protection of the person from great bodily harm." See. 1019 (2 Wharton's Crim. Law).

Section 465, Wharton on Homicide, cited in the Allen case by Mr. Justice Brown, 164 U. S., pp. 492-497, and cited by the Circuit Court of Appeals herein has no application since it is an express statement of the rule "in a case of personal conflict, where the defendant seeks to defend on the ground of excusable, (not justifiable) homicide." To ascertain Wharton's views on the subject in the latter case, resort should be had to Section 1019 quoted from his work in the Runyan case, and approved by this Court in the Beard case. Under the facts in the Allen case, as shown by the dissenting opinion by Judge Brewer in the first report of the case (150 U. S.) the only issue made by the defendant was whether his offense was manslaughter rather than murder. There was no issue of justifiable homicide, hence the quotation of Justice Brown from Wharton must be confined in its application to the particular case of personal conflict and excusable homicide, in which, as shown in Russell on Crimes, quoted in the brief at length, there was always the duty to retreat.

In the Rowe case, 164 U. S., p. 546, the facts were that—

The defendant was in the office at a hotel in the Cherokee nation. An altercation arose between him and the deceased, in which the defendant struck the deceased. Thereafter the

defendant's conduct indicated his purpose to withdraw from the conflict. The deceased afterward assaulted the defendant with a knife, under such circumstances as to lead him to the belief that he was in danger of death or serious bodily injury. Without retreating the defendant shot and killed the deceased. The trial court charged that it was the duty of the deceased to retreat. The Supreme Court held this error, saying:

"If the accused did, in fact, withdraw from the combat, and intended so to do, and if his conduct should have been reasonably so interpreted by the deceased, then the assault of the latter with a deadly weapon, with the intent to take the life of the accused, or to do him great bodily harm, entitled the latter to the benefit of the principle announced in *Beard vs. United States*, 156 U. S. 550, 564 (39; 1066, 1092) in which case it was said: 'The defendant was where he had the right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such a way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.'"

"The accused was where he had the right to be, and the law did not require him to step aside when his assailant was rapidly advancing upon him with a deadly weapon. The danger in which the accused was, or believed himself to be, at the moment he fired, is to some extent indicated by the fact, proved by the Government, that immediately after he disabled his assailant (who had two knives upon his person), he said that he, the accused, was himself mortally wounded and wished a physician to be called. The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary or what he had reason-

able grounds to believe at the time was necessary, to save his life or to protect himself from great bodily harm. And under the circumstances, it was error, to make the case depend in whole or in part upon the inquiry whether the accused could, by stepping aside, have avoided the attack, or could have so carefully aimed his pistol as to paralyze the arm of his assailant without more seriously wounding him."

It will be noted herein, that Justice Brown, who wrote the opinion in the *Allen* case, dissented in the *Rowe* case, where the Supreme Court made the right of the defendant to stand his ground depend entirely upon the principle that he had a right to resist a felonious attack without retreating. It is likely that Judge Brown was an adherent of the view that the early common law required retreat in justifiable homicide. The majority disagreed with him. In other words, it is reasonable to interpret that the majority of the court in the opinion written by Judge Harlan, who wrote the opinion in the *Beard* case, refused to hold that there was the same obligation to retreat in justifiable self-defense that there was in excusable self-defense, hence Judge Brown's dissent.

We will call attention to some State cases upholding these views and based on a determination of what the early common law was.

In the case of *Carpenter vs. State*, 36 B. W., p. 906, it is said that the common law was enacted as the statutory law on homicide in Arkansas.

Section 1670 thereof defines justifiable homicide as follows:

"Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony."

Section 1672 declares that an attempt to commit murder,

rape, robbery, burglary, or any other aggravated felony, although not herein specifically named, upon either the person or property of any person shall be justification of homicide.

Section 1676 refers to excusable homicide *se et sua defendendo*.

"In ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary, and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given."

This was made clear by the court in its discussion of these sections, saying:

"These statutes, as far as they extend, are a re-enactment of the common law. They make homicide in self-defense excusable, and justify those committed by the slayer in defense of 'person, habitation or property, against one who manifestly intends and endeavors by violence or surprise, to commit a known felony, such as murder, robbery, arson, burglary, and the like, upon either, as at common law. As construed by this court, they uphold, protect and enforce the right to slay an assailant in self-defense, to the same extent as it existed at the time of their enactment. To construe them properly, it is necessary to ascertain what the common law upon the same subject was at the time they took effect.

"At common law, and under the statutes of this State, no one, in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden encounter, or in a combat on a sudden quarrel, or from anger suddenly aroused at the time it is made, or in a mutual combat, is justified or excused in taking the life of the assailant, unless he is endangered by such assault as to make it necessary to kill the assailant to save his own life, or to prevent a great bodily injury, and he employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing. He

cannot provoke an attack, bring on the combat, and then slay his assailant, and claim exemption from the consequences of killing his adversary, on the ground of self-defense. He cannot invite or voluntarily bring upon himself an attack, with the view of resisting it, and, when he has done so, slay his assailant, and then shield himself on the assumption that he was defending himself. He cannot take advantage of a necessity produced by his own unlawful or wrongful act. After having provoked or invited the attack, or brought on the combat, he cannot be excused or justified in killing his assailant for the purpose of saving his own life, or preventing a great bodily injury, until he has, in good faith, withdrawn from the combat, as far as he can, and done all in his power to avoid the danger and avert the necessity of killing. If he has done so, and the other pursues him, and the taking of life becomes necessary to save life or prevent a great bodily injury, he is excusable. *Palmore vs. State*, 29 Ark. 248; *Mepheron vs. State*, 29 Ark. 225; *Levells vs. State*, 32 Ark. 585; *Stanton vs. State*, 13 Ark. 317; *Dolan vs. State*, 40 Ark. 454; *Fitzpatrick vs. State*, 37 Ark. 238; *Duncan vs. State*, 49 Ark. 543, 6 S. W. 164; *Johnson vs. State*, 58 Ark. 57, 23 S. W. 7; *Smith vs. State*, 59 Ark. 132, 26 S. W. 712.

"But the rule is different **where a man is assaulted with a murderous intent**. He is then under no obligation to retreat, but may stand his ground, and, if need be, kill his adversary."

Continuing, the court said:

"In East's Pleas of the Crown, the author says: 'A man may repel force by force, in defense of his person, habitation, or property against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat but may pursue his adversary until he has secured himself from all danger, and if he killed him in so doing it is called **justifiable self-defense**, as on the other hand, the killing by such felon of any person so lawfully defending himself will be murder.' 1 East, P. C. p. 271, See, to the same effect, 4 Bl. Com., p. 180; *Foster's Crown Law*, 273; and 1 Bish. New Cr. Law. Sec. 850."

"According to the common law, it is the duty of every one, seeing any felony attempted, by force to prevent it, if need be, by the extinguishment of the felon's existence. This is a public duty, and the discharge of it is regarded as promotive of justice. Any one who fails to discharge it is guilty of an indictable misdemeanor, called 'misprision of felony.' And, as a result of this doctrine Mr. Bishop says, 'If a man murderously attacked by another flies instead of resisting, he commits, substantially, this offense of misprision of felony even though we should admit that in strict law he will be excused, because acting from the commendable motive of saving life.'"

1 Bish. New Cr. Law, Sec. 851, 849; Pond vs. People 8 Mich. 150, See also, Bostic vs. State, 94 Ala. 45, 10 South, 602; Weaver vs. State, 53 Am. Rep. 389; Gray vs. Combs, 7 J. J. Marsh, 478; 4 Bl. Comm. 180; 1 Hale, P. C. 480; Clark, Cr. Law, 137; 1 Whart. Cr. Law (10th Ed.) Sec. 495.

Cain's Case, 20 W. Va. 679, contains a clear and concise statement of the common law distinction upon the subject. Therein the court said:

"Where there is a quarrel between two persons, and both are in fault, and a combat as the result of such quarrel takes place, and death ensues, in order to reduce the offense to killing in self-defense two things must appear from the evidence and the circumstances of the case—First: That before the mortal blow was given the prisoner declined further combat, and retreated as far as he could with safety; and, secondly, that he necessarily killed the deceased in order to preserve his own life, or to protect himself from great bodily harm. When one, without fault himself, is attacked by another in such a manner, or under such circumstances, as to furnish a reasonable grounds for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such decision will be accomplished, and the person assaulted has reasonable ground to believe, and does believe, such danger is imminent, he may act upon such appearances, and without retreating kill his assailant, if he has reasonable

grounds to believe, and does believe that such killing is necessary to avoid the apparent danger."

In *State vs. Clark*, 41 S. E. 207, a careful consideration of the subject, was given to it by the Supreme Court of Appeals of West Virginia and it declared:

"Where an attack is made with murderous intent, there being a sufficient overt act, the person attacked is under no duty to fly. He may stand his ground and, if need be, kill his adversary." Bish. Cr. Law, Sec. 850. "It is familiar doctrine that one assaulted with murderous intent may avert the felonious result by taking the aggressor's life. The law of self-defense justifies him, but justification rests equally in the fact that he is resisting the commission of a felony." Bish. Cr. Law, Secs. 849, 866. See also, Whart. Hom. Sec. 533; Manns' Case, 48 W. Va. 480, 37 S. E. 613. So far as point 1 of the syllabus is in conflict with these principles, it is overruled. 'In a case of simple assault, not made with the intent to kill or do other great bodily harm, where the person assailed is not deceived as to its character, so as to be within the rules regarding mistake of fact; in other words, where the intent of the assailant is not to commit a felony, but a misdemeanor, this right of perfect defense does not exist. The assailed person is not permitted to stand and kill his adversary if there is a way of escape open to him, while yet he may repel force by force, and, within limits differing with the facts of cases, give back blow for blow. The rule, to which the exceptions are not numerous, appears pretty distinctly to be that the law does not justify one in killing another simply to prevent his committing a misdemeanor. These cases of mere assault, and cases of mutual quarrel, (the *Allen* case for instance) where the attacking party has not the purpose of murder in his heart, are those to which is applied the doctrine of the books, that one cannot justify the killing of another, though apparently in self-defense, unless he retreated "to the wall," or other interposing obstacle, before resorting to this extreme right.' Bish. Cr. Law, Sec. 850. The only exception to this is where a man is assaulted, without intent to kill, in his own dwelling house. There he need not run or retreat, but he cannot kill his

adversary unless it is necessary to save his own life or prevent another felony. Bish. Cr. Law.. Sec. 868; Beard vs. U. S. 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086."

There are many other cases where the principle has been traced which uphold the views here expressed. See *Erwin vs. State*, 29 Ohio State, *Pond vs. People of Mich.*

In the State of North Carolina, where the retreat rule is adhered to, there has been strong dissent and forcible declaration of what the common law was upon the subject.

In *State vs. Gentry*, 34 S. E., p. 706, *Montgomery, J.*, dissenting, the court said:

"In *Fost. Crown Law*, p. 273, it is written: 'The writers on the Crown Law, who, I think, have not treated the subject of self-defense with due precision, do not, in terms, make the distinction I am aiming at, **yet all agree** that there are cases in which a man may, without retreating, oppose force by force, even to the death. This I call justifiable self-defense, they justifiable homicide. In the case of justifiable self-defense, the injured party may repel force with force, in defense of his person, habitation, or property, against one who manifestly intendeth, and endeavoreth, with violence or surprise, to commit a known felony on either. **In these cases he is not obliged to retreat**, but may pursue his adversary till he findeth himself out of danger, and, if in a conflict between them he happeneth to kill, such killing is justifiable. The right of self-defense in these cases is founded on the law of nature, and is not, nor can be, suspended by any law of society.'

"A distinction which seems reasonable, and is supported by authority, is taken between assaults with felonious intent and assaults without felonious intent. In the latter case, the person assaulted may not stand his ground and kill his adversary, if there is any way of escape open to him, though he is allowed to repel force by force; in the former, where the attack is made with murderous intent, the person attacked is under no obligation to flee. He may stand his ground, and kill his adversary, if need be.' *Id.* Sec. 633, and cases there cited. And so Mr. East states the law to

be:—"A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, burglary, robbery, and the like upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and, if he kills him in so doing, it is called justifiable self-defense." 1 East. P. C. 271; 2 Bish. Cr. Law, Sec. 633. The American doctrine is to the same effect: "If the person assaulted, being himself faultless, reasonably apprehends death or great bodily harm to himself unless he kill the assailant, the killing is justifiable." Id. Sec. 644. "The attempt to commit a felony upon the person may be resisted to the death without flying or avoiding combat." Id. Sec. 652."

Another View.

In this case Brown was a contractor, employee or servant of the Government, in the performance of his business, and engaged in carrying out a contract with his employer, owner of the tract of land upon which the assault occurred. He was at what may be termed his place of business, or at his master's place of business. He had been for days at the place engaged in superintending the loading and removal of the dirt by his teamsters.

It has never been held that a man must retreat from his place of business when feloniously assaulted, on the contrary he may stand his ground. It is also uniformly held that a servant or employer has the same right as the owner. If Brown had owned the lot he would not have been obliged to retreat. He was at the place of his business or his master's business. We submit that this gave him the right to stand his ground.

Even in the States which adhere to the view of the necessity to retreat, it is uniformly held that one who is attacked

by another in his place of business, in such manner as would cause a person to believe that he is in immediate danger of death or serious bodily harm, is not obligated to retreat, but would be justified in taking the life of his assailant. See *Andrews vs. State*, 159 Ala., 14; 48 Southern 858; *Carey vs. State* 76 Ala. 78; *State vs. Goodager*, 56 Ore., 198; 106 Pac. 38; *Re-hearing denied*, 108 Pac. 185.

In the case of *Haines vs. State*, 17 Georgia, 46, a person entitled to joint use of a well, went there to draw water for his family. While there he was attacked. It was held by the Supreme Court of Georgia, that he was not required to retreat, but might kill his assailant, if necessary, to protect himself from death or serious bodily injury.

This right to stand ground applies also to a servant or employee of the owner of the premises in the states where the strict rule of duty to retreat is enforced. See *Snell vs. Derricott*, Ala., 49 Southern, p. 895.

Defense of the Castle.

The right to defend one's home, even to the point of slaying one who forcibly intruded therein, or who assaulted the owner therein, does not seem to have depended at the common law entirely on the fact that the slayer was assaulted feloniously, that is with an intent to kill him. See Section 858 Bishop's New Cr. Law. There it is stated:

"Sec. 858: Defense of the Castle—In the early times, our forefathers were compelled to protect themselves in their habitations by converting them into holds of defense; and so the dwelling house was called a castle. To this condition of things the law has conformed, resulting in the familiar doctrine that while a man keeps the doors of his house closed, no other may break and enter it, except in particular circumstances to make an arrest or the like—cases not within

the line of our present expositions. From this doctrine is derived another; namely, that the persons within the house may exercise all needful force to keep aggressors out, even to the taking of life. As observed by Campbell, Jr., in Michigan, a man is not obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life.' And in Missouri a man's business office was held to be his dwelling within this rule."

In support of this text, the author quotes 1 Hale's P. C. 458, declaring:

"A bailiff, having a warrant to arrest Cook upon a *capias ad satisfaciendum*, came to Cook's house and gave him notice; Cook menaceth to shoot him if he depart not, yet the bailiff departs not, but breaks open the window to make the arrest; Cook shoots him, and kills him; it was ruled: (1): That it is not murder because he cannot break the house, otherwise it had been if it had been upon an *habere facias possessionem*. (2): But it was manslaughter, because he knew him to be a bailiff. But, (3): Had he not known him to be a bailiff, or one that came upon that business, it had been no felony, because done in defense of his house. *S. C. Cook's Case, Cro. Car. 537.*"

It would seem from the number of cases cited under this text that this doctrine was thoroughly, and well-established.

In the leading case of *Aldrich vs. Wright*, 16 American Reports at page 341 (53 N. H. 398), the Supreme Court of New Hampshire describes the common law theory of self-defense as being the same as that of the natural law recognized by the Bill of Rights, saying:

"Higher and earlier in its origin than the constitution of the common law, not superseded by those temporal and finite systems, but sustained and enforced by the declaration and sanction of the highest, primary, eternal and infinite law of nature (3 Bl. Com. 4; 1 Hale's P. C. (Am. ed. of 1847) 479, note 1, the right of defense cannot be

prescribed within the limits of a narrow technical rule. It is an original and comprehensive prerogative, necessarily ascertained and defined by natural reason. It is not established by any fallible authority, nor measured by any precedent, nor restricted by any arbitrary dogma. Long upheld by the common law, it has, under the administration of that law, theoretically been what it was before; and now, reinforced by a constitutional guaranty, it is what it has always been. The authorities of the common law show what it has been held to be by men whose opinions are entitled to great consideration. If any discrepancy should be found in the definitions of it, given by common law precedent and by natural reason, the latter must prevail, because the right is explicitly asserted in the bill of rights as a natural right, and not as one defined by common law authorities. But between the natural right and its common law definition rightly understood there is no variance that concerns the present inquiry."

* * * * *

At page 360 the New Hampshire court declares that this common law doctrine of self-defense is:

"The authorities are, that a man may oppose a deadly resistance to a felonious attack, but not to a mere trespass (a trespass against a man's castle being sometimes excepted 3 Greenl. Ev. Sec. 117; East's P. C., ch. 5, Sec. 56; Com. vs. Drew, 4 Mass. 391; 396; Rose Cr. E. 770; 1 Bishop's Cr. L. Sec. 858, 5 ed. A man, in defense of his possession of land or goods, 'may justify an assault and battery; but he cannot justify either mayheming or wounding, or maiming of life and members, and so note a diversity between the defense of his person and the defense of his possession or goods. 2 Inst. 316. Where the trespass is barely against property, 'the law does not admit the force of the provocation sufficient to warrant the owner in making use of any deadly or dangerous weapon.' 1 East's P. C., ch. 5, Sec. 56. But a man, upon whom or whose property another manifestly intends to commit a known felony by violence or surprise, is not obliged to retreat; on the contrary he may pursue his adversary, and kill him if necessary to prevent the felony. 1 East's P. C., ch. 5, Secs. 44, 45; 3

Greenl. Ev., Sec. 115; 4 Bl. Com. 180; Fost. Cr. L. 274.

"Where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting; but 'the law of England' will not 'suffer with impunity any crime to be prevented by death unless the same, if committed, would also be punished by death.' 4 Bl. Com. 181, 182; 1 Bishop's Cr. L. Sec. 849, 5th Ed. The rule generally laid down is, that a deadly resistance is lawful only against an apparent, forcible felony."

NOTE—At the common law an assault to commit a known felony was punishable by death. Id.

The books are full of the authorities sustaining the contention here urged. We have endeavored, however, to confine our citations to a few of the leading cases lest our argument be too long.

In view of the foregoing array of authorities, as to what the early common law is; in view of the express declaration of approval in the Beard case by the Supreme Court of the principle upon which they rest; in view of the subsequent recognition, and strong reiteration of the common law doctrine, as a principle, in the Rowe case by the same court; in view of the absence of any Federal statute defining a failure to retreat as an element of the offense of murder, in view of the necessity therefore of resort to the common law to ascertain whether or not this duty existed, we submit, with all due respect and deference, that this court should hold that the Trial Court erred in charging and the Circuit Court of Appeals in affirming that the duty was imposed upon the defendant to retreat before he could resist an assault which, viewed from his standpoint, was calculated to inflict upon him death or some serious bodily injury.

THE RULE OF "RIGHT TO STAND GROUND" IS THE RULE OF REASON.

It seems to us that the rule contended for by petitioner is in accord with reason. The principal thought that must control the mind of any one who is assaulted by another with apparent murderous intent is the necessity of saving his own life, and not whether he is on one side or the other of a boundary line whose exact location may not be known to him. It would make very little difference to the assaulted party, whether he was killed on his own or another's land. Intent is always the controlling element in determining the culpability of a defendant for the commission of a given act. If this be true, can it be truly said that a man's intent in resisting an unlawful deadly assault with the necessary force is criminal or not, depending upon whether he was upon one side or the other of an imaginary boundary line enclosing his premises? It seems to us that an arbitrary rule, making the motive which controlled one in killing his assailant, viz—the necessity of saving his own life, lawful on one side of a boundary line, and the same motive inducing the same act, prompted by the same laws of nature, without consciousness at the moment of location or boundaries, wrong, unlawful, and felonious, when committed upon the other side of the line, is not in accord with reason or justice.

If two men, who are tenants in common in a tract of land, are standing beyond the boundary thereof, one six feet, and the other four feet beyond the same boundary, be both attacked at the same time from the same direction by two different assailants unlawfully, and both put in fear of their lives, and both should retreat five feet from the point at which they were assaulted, and then stand their ground, and each kill his assailant, and in each instance there was opportunity for

further retreat, could it be said that there was any difference in the justification, because one was one foot within, and the other one foot without the line? Or say for instance that A and B own adjoining tracts, and that near the common boundary line both are on the land of B and they are unlawfully assailed by two persons endeavoring to kill them, and each, in an effort to save himself, controlled by the dominant-motive existing in every man's mind of self-preservation, slays his adversary without retreating; say at the time neither A nor B knew on which side of the line he was, could it be said, with any degree of respect for the principles of the reason, the logic and the justice of the law, that one was guilty and the other not? If neither retreated, and each was controlled by the same motive of self preservation, could there be any arbitrary duty upon A to retreat, and on B no such duty be imposed? Would A be found guilty of murder and B discharged.

Again, supposing that A and B are assaulted feloniously by C and D on a tract of land, the title to which, is yet undetermined, but claimed by both A and B. A and B believing their lives are in peril slay their assailants, without retreating and without stopping to consider in whom the title or ownership of the land is vested. In such case, according to the rule laid down by the Circuit Court of Appeals, the guilt of one and the innocence of the other should be determined by a civil action in ejectment, or trespass to try title, for its decision makes guilt or innocence depend entirely on the arbitrary question of title. This seems an absurd conclusion, yet it logically follows if the right to defend one's self against a murderous assault is made to depend on whether or not the party assaulted has title to the premises on which the assault occurred.

We submit that the rule announced by the early common law writers and recognized by this court in the *Beard* and *Rowe* cases, *supra*, is in accord with reason, and the principle announced at the civil law that "right need never yield to wrong."

THIRD POINT

THE CIRCUIT COURT OF APPEALS ERRED IN NOT HOLDING THAT THE DISTRICT COURT ERRED IN FAILING TO SUBMIT TO THE JURY THE ISSUES OF ASSAULT WITH INTENT TO MURDER AND AGGRAVATED ASSAULT, AND IN REFUSING PETITIONER'S REQUESTED INSTRUCTION NO. 14 ON SUCH ISSUES.

ARGUMENT.

It was the theory of the defendant, and there was evidence supporting it, that the third shot inflicted the mortal wound, and was fired in self-defense, and that the fourth shot inflicted only a superficial wound, which would not have caused death, and was fired accidentally.

It was the theory of the Government that the fourth shot inflicted the mortal wound, and was fired under such circumstances that if death resulted therefrom defendant was guilty of some phase of homicide.

See evidence quoted in full in statement, *supra*.

Under these circumstances it was incumbent on the court to charge that if the fourth shot was fired with intent to kill, but did not inflict the fatal wound, but the fatal wound was inflicted by the third shot, and that defendant, was justified in firing such third shot in his necessary self-defense, then defendant could only be convicted of assault with intent to murder, or aggravated assault dependent on whether the

fourth shot was fired under such circumstances that if death had resulted therefrom the homicide would have been murder or manslaughter. It was fundamental error not to submit every issue made by the evidence. The court's attention was called to the failure to submit this by requested instruction No. 14, which was refused, to which action of the court the defendant excepted. (Trans. p. 254.).

FOURTH POINT

The judgment below should be reversed.

W. E. Pope
.....

GORDON BOONE,

JAMES R. DOUGHERTY,

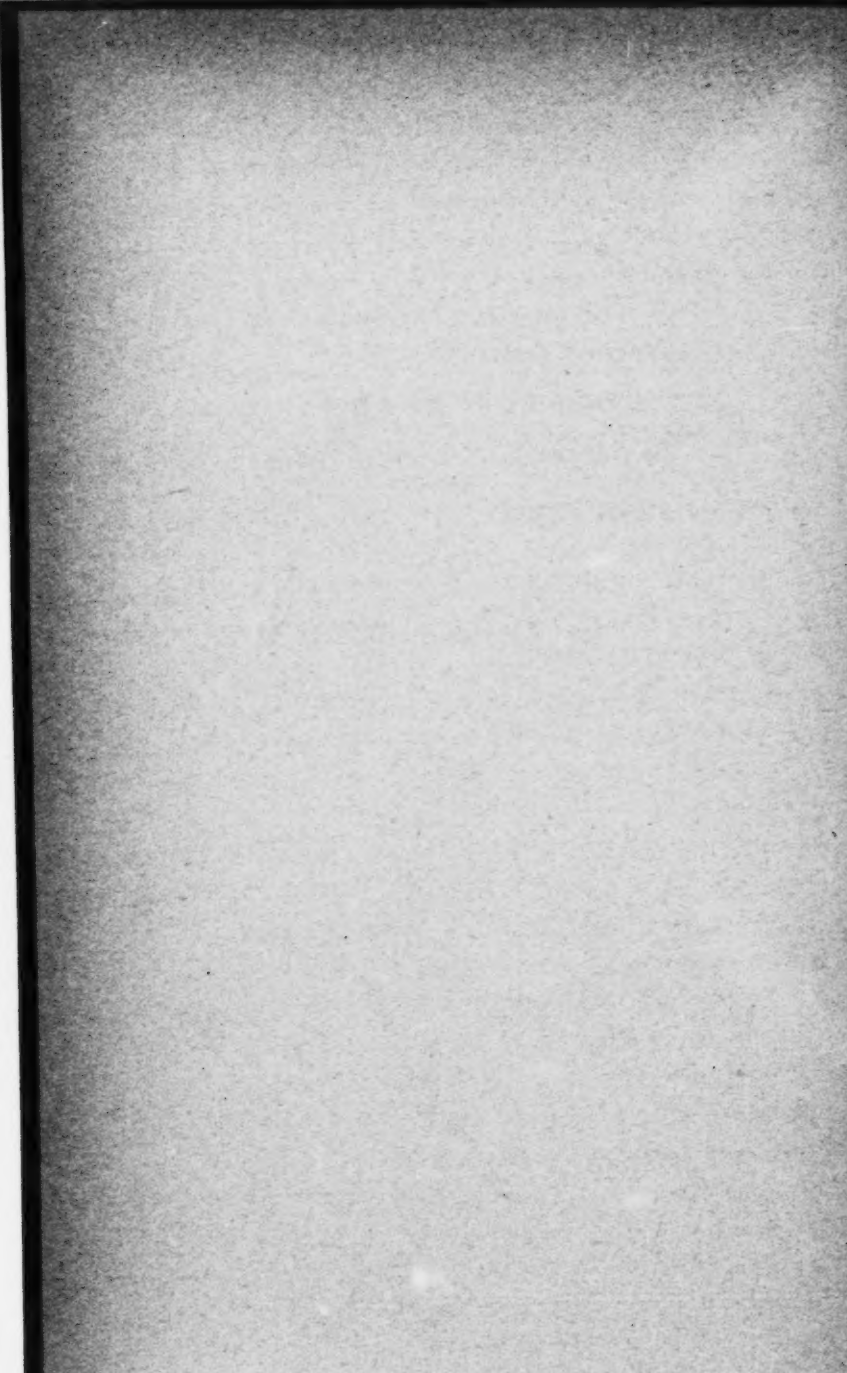
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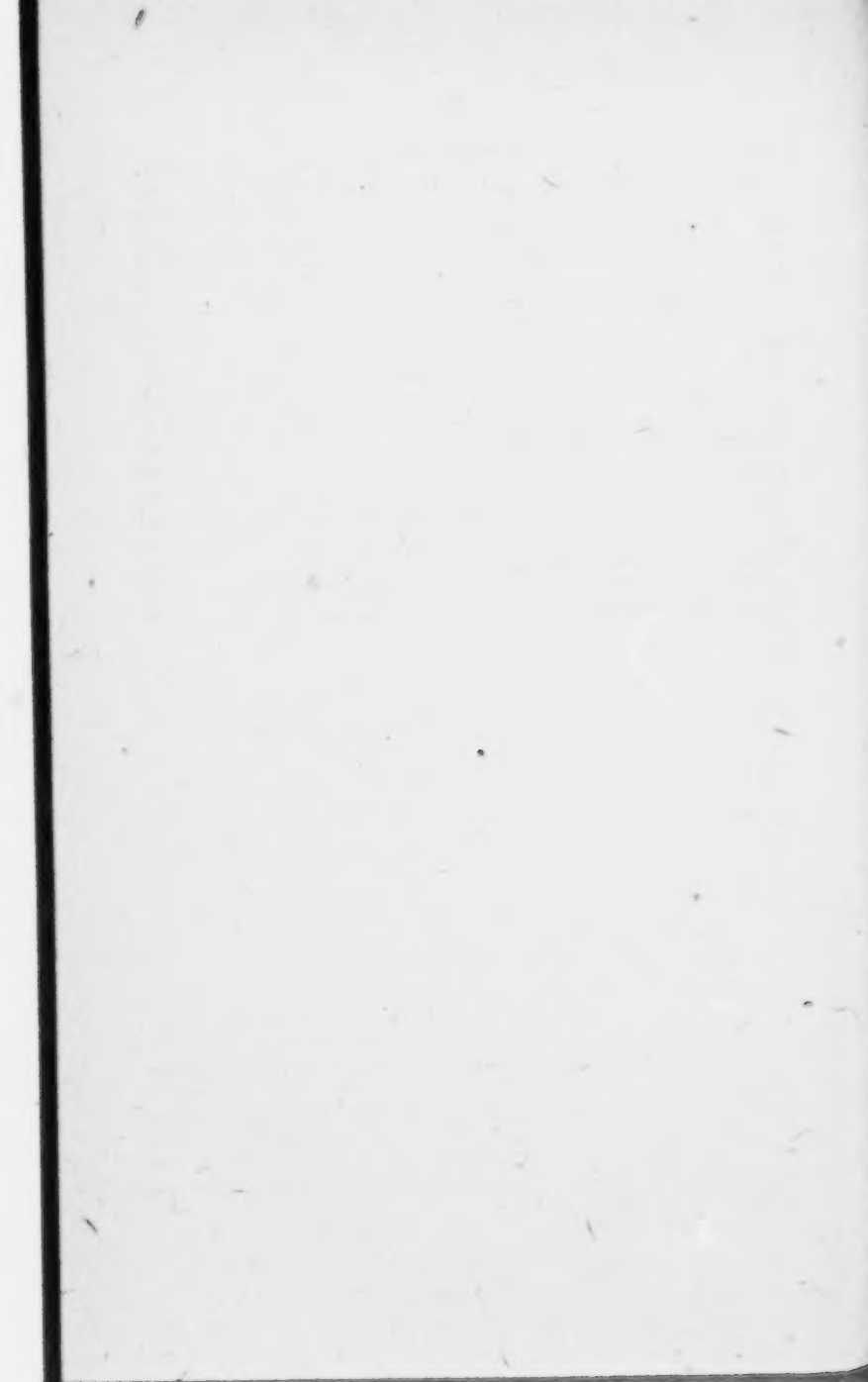
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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

ROBERT B. BROWN, PETITIONER,	}	No. 364.
v.		
THE UNITED STATES.		

*ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT.*

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

The petitioner was convicted and sentenced in the United States District Court for the Southern District of Texas for murder in the second degree committed at a place within the exclusive jurisdiction of the United States, viz, at the site of the post office building in Beeville, Tex. On writ of error from the Court of Appeals for the Fifth Circuit the judgment was affirmed, the court rendering an opinion which carefully considered all the errors assigned, and to which we refer (R. 205-213; 257-Fed. 46). The present writ of certiorari was then applied for and granted.

ARGUMENT.

I.

THE INDICTMENT.

The indictment (R. 4-6) alleged that prior to the date of the homicide the United States acquired in the town of Beeville, Tex., a tract of land "for the public purpose of the United States." The description of the land was given at length by metes and bounds. It was alleged that prior to the homicide exclusive jurisdiction over the land was ceded to the United States by the State of Texas, and that such exclusive jurisdiction still obtained.

The petitioner moved to quash the indictment because it "charged no offense against the laws of the United States" (R. 9, 10). He also moved in arrest of judgment, on what grounds does not appear (R. 11, 12). He now claims that the indictment was fatally defective because it did not allege that the land was acquired for the erection of a fort, etc., "or other needful building."

The Court of Appeals held (a) that the defect, if any, was cured by section 1025, R. S.; (b) that a description of the property, by metes and bounds, was sufficient, the court being bound to take judicial notice of the fact that it was the site of the post office at Beeville; (c) that, since under the statutes of Texas the governor was authorized to cede jurisdiction for post offices, and had made a cession, it would be presumed that he had acted in accordance with the statutory authority (R. 207-209;

257 Fed., 48-51). As we can add nothing to the reasoning of the Court of Appeals on these points, we refer to and rely upon it and the authorities cited in the opinion.

In addition, attention is called to the amendment of section 269, Judicial Code, by the act of February 26, 1919, ch. 48, 40 Stat., 1181, which amendment reads as follows:

On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

The statute is clear, mandatory in its terms, and highly remedial. It should be applied in every case falling within its broad purpose so as to cure, as far as possible, the evil aimed at.

There is, of course, no question that a post office is "a needful building" within the meaning of the Constitution and of section 272, Criminal Code (*Battle v. United States*, 209 U. S. 36). The first witness called in the case at bar—Fenner, the surveyor—testified that the homicide occurred on the post-office site (R. 68 *et seq.*). Thereafter the trial proceeded without question on this basis. This court will not now listen to a suggestion that the proceedings should all be held for naught because the indictment did not in terms allege what everybody knew.

II.

THE REFUSAL TO TRY THE CASE IN BEE COUNTY.

This, while assigned as error and argued in the Court of Appeals, is not discussed in the brief in this court. We mention it out of abundant caution, but are satisfied to rely on the opinion of the Court of Appeals to the effect that the District Court for the Southern District of Texas never lost jurisdiction of the cause by the original transfer of the trial to Bee County, and that the trial judge had not abused the discretion conferred on him by section 40, Judicial Code, by refusing to transfer to Bee County the trial on the substituted indictment (R. 206, 207; 257 Fed. 47, 48).

III.

THE CHARGE AND THE REFUSAL TO CHARGE ON THE QUESTION OF THE DUTY TO RETREAT FROM A MURDEROUS ASSAULT.

The petitioner and the slain man—Hermis—had for some 10 years or more (R. 98) lived in Beeville, a town of about 2,000 inhabitants (R. 118). They were each engaged in the hauling business in competition (R. 117, 118). It may be presumed that competition for this business in a small town would engender more or less personal friction. There had been hard feeling between them. We have not Hermis's side of the story, but it would be contrary to human experience to suppose that all the blame was his. Hermis had made threats against petitioner on various occasions, and some of these had been reported to Brown. The latter testified to two assaults upon

him by Hermis, both with a knife.¹ The first was at the depot some 8 or 8½ years prior to the homicide (R. 131). The second was in a saloon in September or October, 1915 (R. 116). The negro, Archer, testified to threats some two months before the homicide, which, however, he communicated, not to Brown, for whom he was working, but to Ruebush (R. 102). Thornton testified to bad blood between the two men (R. 107). Two witnesses and the petitioner himself testified to an assault by Hermis, with a knife, on the petitioner in a saloon in September or October, 1915. (R. 115, 116, 130.) Carvel and Taylor, station agents, testified to bad feeling, and threats by Hermis at the station (R. 117, 118). Perkins, a peace officer, testified to the same general effect, but admits that Hermis had never been in trouble during the 9 years Perkins was such officer (R. 119, 120). Francis and Cheney (R. 120, 121) do not add anything of importance. Ruebush's testimony (R. 110 *et seq.*) does not seem of much weight. He says he communicated certain threats to petitioner.

As to the knife owned or drawn by Hermis on several occasions, as testified to by petitioner's witnesses, Thornton, a peace officer, speaks of "a large one-bladed Barlow" (R. 107), but says of the knives which "were on his person" after his death that one "was an ordinary pocket knife and the other a small knife." (R. 108.) Perkins (R. 119) speaks of

¹ To understand the dates given by the witnesses it should be stated that the homicide was in May, 1917, and the trial in January, 1918.

"a small pocket knife;" Francis (R. 120), of a Barlow knife of "an average size" (R. 121). The petitioner testified that the blade of the knife he claims Hermis threatened him with "looked about 3 or 3½ inches long" (R. 128).

Petitioner and Hermis were both engaged in hauling dirt removed from the excavation of the post-office site. Some dispute had arisen between them as to the right of Hermis to remove certain black dirt (See R. 118). Petitioner was a man weighing 175 or 180 pounds, Hermis a smaller man weighing about 155 or 160 pounds (R. 80). The petitioner testified that on the afternoon of the homicide, moved by Hermis' threats, he took to the excavation a 41 caliber sixshooter Colt revolver (R. 127; see also R. 106). He wrapped the gun in a slicker lying on the top of the dump (R. 99, 103). This dump was on the southwest part of the post-office lot, and was some 5 or 7 feet high, and of course slightly more on its western slope (R. 72). Its greatest length seems to have been from north to south, and its width was some 7 or 8 feet. It is impossible, however, to reconcile the various statements of the witnesses as to distances, which is natural when the infirmity of human observation and the length of time between the homicide and the trial are considered. Hermis came up on a wagon driven by his servant Miller to get a load of dirt. He got out on the ground at the rear of the wagon. The petitioner was standing on the dump end, according to his own statement, was some 20 or 25 feet away (R. 131). The petitioner told Miller

he could not remove the dirt from that place. Thereupon Hermis started up the dump. The petitioner, after telling him (according to his own statement) to stop, went over to his slicker, got his gun from it, and shot Hermis four times. At the third shot Hermis fell to the ground, and the fourth shot was fired with Hermis recumbent and the petitioner standing above him. Each shot took effect, one in the left thigh below the groin, another to the left of the breast bone, another two inches above the left nipple, another severing completely the thoracic aorta (a large artery from the heart), and causing death (R. 88, 89). The distances at which the several shots were fired probably differed as Hermis and the petitioner moved about. After the fourth shot, the petitioner walked away, without expressing regret, making inquiry, or offering assistance (R. 133).

The above (we believe) condenses the undisputed facts. It is now necessary to consider the petitioner's testimony. There are two, and only two, vital points in it, one as to Hermis' assault with an open knife, the other as to the fourth shot being accidental. There were 12 eyewitnesses to the shooting in all or a part of its phases (excluding the petitioner), 7 called by the United States and 5 by the petitioner. All 7 of the Government witnesses testified positively that Hermis did not assault petitioner, and had no knife; and that the fourth shot was deliberately fired. Of the witnesses for the petitioner, all testified similarly as to the fourth shot. Ruebush, a partisan of the petitioner, does say that Brown "had his gun

toward his side and the fourth shot was fired" (R. 112). But this is not the language in which a friend would describe an accidental shot, and it can not be taken to affect the universal agreement of the witnesses on the subject. As to the assault and the knife, the petitioner's witnesses were as follows: Gabeo (R. 102) says nothing on the subject, and, therefore, by a just presumption, saw nothing; Rodriguez (R. 105) states positively that he saw nothing in Hermis' hand and did not see him strike Brown; Ruebush (R. 112) said it looked as though Hermis was striking at petitioner, but he saw no knife, and his description of the affair is inconsistent with Hermis' having one; Stockbridge, related by marriage to petitioner, "thinks" Hermis had a knife because the latter was "reaching," but he admits he did not see anything in his hand although his vision was unobstructed (R. 114, 115); Doughty testified that Hermis was crowding Brown and "striking I thought with a knife from the licks he was making" (R. 98), but admits that he did not see any knife (R. 99). The testimony, therefore, as to the knife (excluding the petitioner) is in effect as unanimous as it is to the volition behind the fourth shot. It must be remembered that Hermis had his coat off and his sleeves rolled up, making it easier to detect a weapon, if he had one, than would ordinarily be the case. As to the fourth shot, the improbability of an accidental shot taking effect when one man is on the ground and the other standing over him increases the

discredit given petitioner's testimony by the other witnesses.

On this state of facts, the question first arises whether any charge as to the law of self-defense was necessary at all, and whether, therefore, the charge as given and complained of by the petitioner may not be disregarded on this writ. The act of February 26, 1919, ch. 48, 40 Stat. 1181, quoted above, seems to apply to such a situation. In *Doremus v. United States*, 262 Fed. 849, 853, the Court of Appeals for the Fifth Circuit, after holding that a charge given by the trial court as to imputed knowledge was erroneous, held that the error was of a kind falling within the act of February 26, 1919, *supra*, and could, therefore, be disregarded, because reasonable men could have drawn from the undisputed testimony only the one inference of actual knowledge. So in *Battle v. United States*, 209 U. S. 36, 38, Mr. Justice Holmes, delivering the opinion of the court, said:

There was an exception to a refusal of the court to instruct the jury on the law of justifiable homicide. Sufficient instructions were given. The evidence, however, would not have warranted such a verdict. *According to the defendant's own testimony the death was due to an accident.* According to all the other evidence, even the most favorable, the defendant was upon a platform above Berry, and Berry either was below standing on a beam in a very insecure place, or else was climbing up to or upon the platform, when the defendant struck him over the head, according to several wit-

nesses, with an iron bolt, until he dropped 50 or 60 feet. *So as to involuntary homicide. There was no evidence of such a case, and the jury under the charge must have found that the defendant made an intentional and unjustified assault of such a kind that the probable consequences were obvious, an assault with a deadly weapon, that either directly caused Berry's death or brought it about by his inevitable fall. (Italics ours.)*

If Battle was not entitled to a charge based upon his own testimony that the homicide was involuntary, it is difficult to see why the petitioner was entitled to a charge on self-defense, when the only support to such a theory was his own testimony. No one but the petitioner saw any assault with a deadly weapon. But, waiving even that, no self-defense can possibly be claimed as to the *fourth* shot. This can only be justified as an accident, so that the *Battle Case* directly applies.

The jury could not, having the slightest regard to their oath, have found that this last shot, fired under the circumstances and relative positions disclosed by the testimony, was unintentional.

If this court should, nevertheless, be of opinion that the petitioner was entitled to a charge on the subject of the duty to retreat from an assault with a deadly weapon, it is necessary first to examine what charges were given and refused.

In the first place; we assume that there can be no objection to the charge because it did not state that the test was the apparent, not the actual,

danger. We refer to this because in the tenth paragraph of the charge the *real* danger and necessity were stated as the condition (R. 153). This, however, was immediately corrected by paragraphs 11, 13-B, 13-C, 14, and 15 (R. 153, 154, 155), where it is distinctly stated and repeated that the test is the *reasonable belief* of the assaulted person, and the *apparent* danger of a retreat. The case, therefore, in this aspect, is exactly like *Addington's Case*, 165 U. S. 180, 187, where the later statement in the charge that the apparent danger was the test was held to cure an earlier, more restricted statement.

The main point, however, as to self-defense, and the only one argued by counsel (Brief p. 53-86) is that the Court, in paragraphs 10, 11, 13-B, 13-C, 14, and 15 of the charge, conditioned petitioner's right to stand his ground and kill Hermis by the proviso that to retreat or attempt to do so would have appeared dangerous to a reasonable man. This is brought out clearly by petitioner's exceptions to the charge, paragraphs 4, and 7 (latter part) (R. 159, 160), and by the requests to charge contained in bills of exceptions 16 (R. 160, 161), 18 (R. 162, 163), 20 (R. 164, 165), 21 (R. 165, 166), all of which are based on the proposition that a person assaulted under such circumstances as to induce a reasonable belief that his life is aimed at is, under no circumstances, bound to retreat, but may stand his ground and kill if necessary.

Counsel in their brief argue earnestly and at length that the common law completely justifies

their claim which should therefore be sustained by this Court. They rely largely upon Foster's statement of the law in his Discourse on Homicide contained in his Crown Law, and point to Mr. Justice Harlan's opinion in *Beard v. United States*, 158 U. S. 550, 564, which certainly sustains their view. As in our opinion the common law in no way supports the claim of counsel, we proceed to examine it in the light of authority.² Such an examination will show (we believe) that the common law never recognized two species of homicide in self-defense, one justifiable and the other excusable; one dispensing with avoidance of, or retreat from an assault with a deadly weapon, the other requiring it; but that, on the contrary, the common law, in every case where public interests, e. g., aid of justice, were not involved, required the assaulted person to avoid homicide, if he could do so without endangering the life of himself or another.

In Bracton (1250), Twiss ed., in Ch. V of Bk. 3, f. 104 b, speaking of the crimes of which the King's courts have jurisdiction, it is said:

Likewise the crime of homicide, whether it be accidental or intentional, although they do not contain the same punishment, because in one case there is rigour, and in the other mercy.

² The following discussion of the common law up to the time of the publication of Foster's Discourse is mainly based on Pollock & Maitland's History of English Law, Vol. II, pp. 476-481; Stephen, History of Criminal Law, Vol. III, pp. 36-41; Professor Beale on Retreat from a Murderous Assault, 16 Harvard Law Review 567.

At f. 134, in speaking of relief to outlawry, he says:

The King is also sometimes bound of grace to grant to him (an outlawed person) his life and limbs, as if by misadventure or in self-defense he has slain a man.

At f. 144 b, in speaking of appeals for homicide, he says:

Likewise if a person has killed a thief in the night, on this condition he shall have impunity, if he could not have spared him with safety to himself, but if he could have done so, it shall be otherwise. For the life and the death of a man are in the King's hand, as before the King at Windsor concerning a certain man of Cocham before William de Ralegh, at that time justiciary, when the lord the King in that case pardoned the death. Likewise if anybody in a case of hamsoken, which is the invasion of a house against the peace of the King, defends himself in his own house, and the invader is killed, he shall remain unpersecuted and unavenged, if he, whom he invaded, could not otherwise defend himself, for it is said that he is not worthy to enjoy peace who is not willing to keep it."

Britton (1290) has nothing to say of justifiable or excusable homicide in Ch. VI, p. 34 *et seq.*, dealing with the subject, but in giving the exception to an appeal of homicide he says (p. 113):

Or he may say, that although he committed the act, yet he did not do it by felony prepenze, but by necessity, in defending

himself, or his wife, or his house, or his family, or his lord, or his lady, from death; or that he killed the man in defense of our peace, or by some mischance, without any thought of felony; in all which cases, if proved, the appellees shall have judgment of acquittal.

As to the decided cases at this period and later, in 1225 a defendant was acquitted who slew an outlaw, for whom hue and cry was out, in self-defense (Bracton's Note Book No. 1084). To the same effect is *Howel's Case* in 1221 (translated in Kenny's Cases on Criminal Law, p. 139), where a carter slew a robber who attacked him and he was acquitted, but only because the deceased was a robber. (See also Y. B. 30-31, Edw. I, 512 (1302), where killing was in self-defense against a known thief whom defendant was endeavoring to arrest.)

On the other hand, in the case in Bracton's Note Book No. 1215, the defendant in self-defense slew a notorious malefactor in the King's forests. Nevertheless, although he could not avoid the assault except by killing (*quia non poterit aliter evadere manus ejus*), it was necessary to obtain a pardon of the King's grace.³

In a precedent book of Edward I's time a justice is supposed to address the following speech to one whose plea of self-defence has been endorsed by the verdict of a jury: "Thomas, these good folk testify upon their oath to all that you have said. Therefore by

³ Consequently by statute 21, Edw. I, St. 2 (1293), foresters were not in the future "to be troubled" as to such matters "before the King and his Justices."

way of judgment we say that what you did was done in self-defence; but we can not deliver you from your imprisonment without the special command of our lord the King; therefore, we will report your condition to the king's court and will procure for you his special grace." (P. & M., Vol. II, 477, 478.)

Precedents of the pardons granted in such cases are given in Pollock and Maitland, Vol. II, p. 478. The procedure is clearly recognized by Stat. 6, Edw. I, Ch. 9 (1278), which provided that thereafter no inquest should be held to inquire whether a homicide was done in self-defense, but the defendant should put himself on the country. If the jury found specially that the killing was done in self-defense, the King would pardon "if it please him." The pardon for homicide in self-defense is again referred to as necessary in an answer of the King in 1310 to certain petitions quoted in Stephen Hist. Cr. Law, Vol. III, p. 38. Also the procedure in such matters is illustrated by certain cases in 1330, and in 1487 translated by Beale, 16 Harv. Law Rev., pp. 570, 571, as follows:

"Note that when a man is acquitted before the justices errant for death of a man *soy defendendo*, the process is such, that he shall have the writ of the Chief Justice, within which writ shall be contained all the record of his acquittal, to the Chancellor; who shall make him his writ of pardon without speaking to the King by course of law. Such a man isailable after the acquittal, &c.

"Scrope (C. J.) and Louthur, Justices, ordered the prisoner to remove the record into the Chancery; and the Chancellor made him a charter in such a case without speaking to the King."

In 4 Henry VII the report reads:

"In the Chancery it was moved that one was indicted because he killed a man *seipsum defendendo*, &c. And the Chancellor said that the indictment should be removed into the King's Bench, and that he would grant a pardon of common grace unto the party according to their form. And it was suggested by the Sergeants at the bar that there was no need of having any pardon in this case; for here the Justices would not arraign him, but dismiss him, &c.; but if the indictment were for felony, and the party put himself upon the inquest for good and ill according to the Statute of Gloucester, c. 9, then if the inquest found that he did it *se defendendo* the Justices would adjudge him to prison until he had a pardon; but here he should be dismissed, and not lose his goods.

"Fairfax (Justice of the King's Bench), who was in the Chancery, went to his companions, and returned and said, that their custom was to take inquest and inquire whether he did it *se defendendo* or not, and if so found he lost his goods, &c.; and so in either way he should have a pardon by his opinion. And so it seemed to the Chancellor that a charter should be granted.

"Note the opinion of the Justices of the Bench against the Sergeants."

In 1302 (Y. B. 30-31, Edw. I, p. 510) there was a homicide in self-defense in endeavoring to arrest a thief and the defendant, being a clerk, was sent to prison of the Bishop, i. e., was convicted so far as the common law was concerned.

Certain cases decided in 1330 are reported in Fitzherbert's Abridgement, Title Corone Nos. 284, 285, 286, and 287, and are abstracted in Stephen, pp. 38, 39. In the first one the killing was clearly in self-defense, the defendant having retreated to the wall, and yet he was remitted to prison to await the King's pardon. In Fitzherbert, Title Corone No. 305 (1330),

It was presented that a man killed another in his own house *se defendendo*. It was asked whether the deceased came to have robbed him, for in such a case a man may kill another though it be not in self-defense. *Quod nota*. And the twelve said not. Wherefore they were charged to tell the way how, &c., it happened, whereby he should obtain the King's pardon. (Beale in 16 H. L. R. 569.)

In 1348 it was said (Fitzherbert, Title Corone No. 261, translated 16 H. L. R. 569):

Where a man justifies the death of another as by warrant to arrest him, and he will not obey him, or that he comes to his house to commit burglary and the like, if the matter be so found the justices let him go quit without the King's pardon; it is otherwise where a man kills another by misfortune, &c.

In 1369 (Lib. Ass. f 274, pl. 31, translated Kenny Cases on Cr. Law, pp. 141, 142) it was held that a chaplain was guilty of homicide who struck with a stick a person assaulting him, and thus killed him because "he might have fled from his assailant."

In *Compton's Case* (22 Lib. Ass. 97, pl. 55, translated 16 H. L. R. 569), Thorpe, C. J., said:

When a man kills another by his warrant he may well avow the fact, and we will freely acquit him without waiting for the King's pardon by his charter in the case. And in many other cases a man may kill another without impeachment, as if thieves come to rob a man, or to commit burglary in his house, he may safely kill them, if he can not take them. And note how it was with a gaoler who came to the gaol with a hatchet in his hand, and just then the prisoners had broken their irons, and were all ready to have killed him, and they wounded him sorely, but with the hatchet in his hand he killed two and then escaped, &c. And it was adjudged in this case by all the council that he would not have done well otherwise, &c. Likewise he said that every person might take thieves in the act of larceny and felons in the act of felony, and if they would not surrender peaceably, but stood on their defence, or fled, in such case he might kill them without blame, &c.

Such and other cases are summed up in Pollock and Maitland, Vol. II, p. 477, thus:

The man who commits homicide by misadventure or in self-defence deserves but needs

a pardon. Bracton can not conceal this from us and it is plain from multitudinous records of Henry III's reign. If the justices have before them a man who, as a verdict declares, has done a deed of this kind, they do not acquit him, nor can they pardon him, they bid him hope for the king's mercy.

By Statute of 24th Henry VIII, Ch. 5 (1532), after a preamble stating that doubt had arisen whether persons who killed another who was attempting to rob or murder any person on or near a highway, etc., or in a mansion, etc., or to commit burglary would forfeit their goods to the king, as a person would who should happen to kill in chance medley in his own defense, it was provided that such persons causing death under such circumstances should not forfeit their goods but should be "acquitted and discharged" in like manner as if "they were lawfully acquitted."

As Prof. Beale points out, this statute must mean that at the time it was not clear whether the killing of a murderer or robber was wholly justifiable, or whether it was merely excusable and therefore needed a pardon involving, probably, a forfeiture of goods, etc. The statute in effect dispensed with a pardon in such cases. In 1603—*Cooper's Case*, Cro. Car. 544—the statute was held to justify acquittal of a person who killed one breaking into a house with intent to commit burglary or to kill any one therein; and it was said to have been made "in affirmance of the common law." (As to this last statement, see P. & M., Vol. II, p. 479.)

Two writers prior to Coke are referred to in Stephen, *supra*. Of Staundforde (*Pleas of the Crown*), Stephen says (Vol. III, p. 47):

The principal part of Staundforde's commentary upon Bracton consists of authorities which show how far Bracton's distinction between inevitable and evitable necessity had been reduced to a certainty. He specifies as cases of inevitable necessity killing in order to arrest, and the cases mentioned in the two statutes above referred to, namely, 21 Edw. I, "de malefactoribus in parais," &c., and 24 Hen. 8, c. 5, as to killing robbers and burglars. As cases of avoidable necessity he reckons all cases of killing in self-defence other than those protected by the statute of Henry VIII, even if the act was necessary to save the life of the person killing.

As to Lambard (1610) Stephen gives (Vol. III, p. 49) his table of homicide contained in his *Eirenarcha* at page 225, from which it clearly appears that justifiable homicide, which is no crime at all, is analogous to killing in aid of justice, and that *all* homicide in self-defense merely comes under the head of excusable, and is not the same as "chance medley." In addition he carefully distinguishes homicide "allowed by law" (in which he includes only those "for the advancement of justice"—see p. 234) from homicide in self-defense. As to the latter, he says (pp. 252, 253):

The last member of voluntarie Homicide, is where one man killeth an other in his owne

defence: and this is neither felonie, or yet anie justifiable killing: but even as the Law of nature (as Cicero in his defence of Milo said) both allow unto man, *Omnem honestam rationem expediendae salutis*: So the Lawes of men do sometime reach unto him *gladium ad occidendum hominem*. And therefore, our Law also is a Sanctuarie for the life and lands of him that killeth an other in the necessitie of his owne defence, if hee cannot otherwise escape with his life from him.

But hee must know, that it is not all one to have to do with a thiefe, or murderer, and with a loyall subject. For albeit hee may boldly defend himselfe, his goods, or his house against a murderer or thiefe, or even hand (as it were) and without any shrinking from him: yet if he be assayled by an other maner of man, he must flie so farre as hee may, and till he bee letted by some wall, hedge, ditch, presse of people, or other impediments: that his necessitie of defence may bee esteemed altogether great and inevitable, and yet shal he be committed til the time of his triall, and shall then loose his goods, and seeke his pardon, for taking away the life of his fellowe subject, Stat. Gloucest. cap. 9.

Coke, in his 3d Institutes, c. 8, p. 55, states the law confusedly, but clearly enough on the point now being considered:

Some be voluntary, and yet being done upon an inevitable cause are no felony. As if A. be assailed by B. and they fight together, and before any mortall blow given A. giveth back,

untill he cometh unto a hedge, wall, or other strait, beyond which he cannot passe, and then in his own defence, and for safeguard of his owne life killeth the other: this is voluntary, and yet no felony, and the jury that finde, it was done *se defendendo*, ought to finde the speciall matter. * * * If A. assault B. so fiercely and violently, and in such a place, and in such manner, as if B. should give back, he should be in danger of his life, he may in this case defend himselfe; and if in that defence he killeth A, it is *se defendendo*, because it is not done *felleo animo*: for the rule is, when he doth it in his own defence, upon any inevitable cause, *Quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur*.

Some without any giving back to a wall, &c. or other inevitable cause. As if a thiefe offer to rob or murder B. either abroad, or in his house, and thereupon assault him, and B. defend himselfe without any giving back, and in his defence killeth the thief, this is no felony; for a man shall never give way to a thief, &c. neither shall he forfeit any thing. And so it is declared by the statute of 24 H. 8. Likewise if a prisoner assault the gaoler, the gaoler is not by law inforced to give back: but if in defence of himselfe he kill the prisoner, this is no felony.

So if any officer, or minister of justice, that hath lawfull warrant, and the party assault the officer or minister of justice, he is not bound by law to give back, but to carry him away: and if in execution of his office he cannot otherwise avoid it, but in striving kill him, it is no felony. And in that case the officer or minis-

ter of justice shall forfeit nothing, but the party so assaulting or offering to flye away, and is killed, shall forfeit his goods and chattels.

This, according to the authorities cited above, is a correct statement of the law. It is evident that Coke knows nothing of any justifiable homicide dispensing with retreat, except where the killing is in aid of justice.

Hale states the law in accord with Coke in so far as the present point is concerned. He says of homicide generally (Pleas of the Crown, Vol. I, pp. 424, 425):

And this is of three kinds: Purely voluntary, *viz.* murder and manslaughter. Purely involuntary, as that other kind of homicide *per infortunium*. 3. Mixt, partly voluntary, and partly involuntary, or in a kind necessary, and this again of two kinds, *viz.* inducing a forfeiture, as *se defendendo*, or not inducing a forfeiture, as, 1. In defense of a man's house. 2. Defense of his person against an assault in *via regia*. 3. In advancement or execution of justice, and according to this distribution I shall proceed.

Here it is clear that all homicides in self-defense are merely excusable, the only justifiable killing being in aid of justice, or derived from the equity of the statute of 24 Henry VIII, c. 5, *supra*, as being in defense of a house or on a public way.

In regard specially to homicides in self-defense Hale says in Ch. XL (pp. 478 *et seq.*):

I come to those homicides that are *ex necessitate*, and this necessity makes the homicide not

simply voluntary, but mixed, partly voluntary and partly involuntary, and is of two kinds.

1. That necessity, which is of a private nature.

2. That necessity, which relates to the public justice and safety.

The former is that necessity, which obligeth a man to his own defense and safeguard, and this takes in these inquiries, 1. What may be done for the safeguard of a man's own life. 2. What may be done for the safeguard of the life of another. 3. What may be done for the safeguard of a man's house of habitation.

I. As touching the first of these, viz. homicide in defense of a man's own life, which is usually styled *se defendendo*.

* * * *

First, therefore, of common homicide *se defendendo*.

Homicide *se defendendo* is the killing of another person in the *necessary* defence of himself against him that assaults him.

* * * *

3. Regularly it is necessary, that the person that kills another in his own defense, fly as far as he may to avoid the violence of the assault before he turn upon his assailant; for tho in cases of hostility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honour, because the king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another.

But this hath some exceptions.

* * * *

2. In relation to the person killed.

If a thief assaults a true man either abroad or in his house to rob or kill him, the true man is not bound to give back, but may kill the assailant, and it is not felony. *Co. P. C. p. 56* (7).

In respect of the manner of the assault.

If *A.* assault *B.* so fiercely, that *B.* cannot save his life if he give back, or if in the assault *B.* fall to the ground, whereby he cannot fly, in such case if *B.* kill *A.* it is *se defendendo*, *Co. P. C. p. 56.* but now here will be occasion to resume the former debate, where the first assailer may be said to kill the assailed *se defendendo*.

It is clear from paragraph 3 above that Hale only dispenses with retreat when the killing is in aid of justice.

Certain cases may be referred to before considering Foster's treatment of the matter. In *Daver's Case* (1623) Godbolt 288, it was held:

And if two men fight together, and one flieth as far as he can, and he which flieth killeth him who doth pursue him, the same is *se defendendo*. Also if one man assaulteth another on the highway, and he who is assaulted killeth the other, he shall forfeit neither life, nor lands, nor goods, if he who killed the other fled as far as he could.

In *Calfield v. the Keeper* (Rolls Reps. 189), there is what appears to be Roll's opinion that where the keeper killed a prisoner for debt, who had escaped and

was resisting arrest, it was manslaughter, since the keeper did not go back as far as he could; but otherwise, if the imprisonment were for a felony, or if the deceased was a robber.

Sir Michael Foster published his Discourse on Homicide in 1762. He first states that homicide is either occasioned by accident (the old *per infortuniam*), or is founded in justice, or in necessity (Foster Crown Law, p. 255). In Ch. II, page 267, he takes up homicides founded in justice, and confines them to cases where a person is killed while resisting an officer having authority to arrest, or where a felon is killed resisting apprehension by any one. In Ch. III, page 273, he treats of homicide founded in necessity and says:

Self-defence naturally falleth under the Head of Homicide founded in Necessity, and may be considered in Two different Views.

It is either that Sort of Homicide *Se & Sua defendendo* which is perfectly Innocent and Justifiable, or that which is in some Measure Blameable and barely Excusable. The Want of attending to this Distinction hath, I believe, thrown some Darkness and Confusion upon this Part of the Law.

The Writers on the Crown-Law, who I think have not treated the Subject of Self-Defence with due Precision, do not in Terms make the Distinction I am aiming at, yet All agree that there are Cases in which a Man may without retreating oppose Force to Force, even to the Death. This I call Justifiable Self-Defence, They Justifiable Homicide.

They likewise agree that there are Cases in which the Defendant cannot avail Himself of the Plea of Self-Defence without shewing that He retreated as far as He could with Safety, and then meerly for the Preservation of his own Life Killed the Assailant. This I call Self-Defence Culpable, but through the Benignity of the Law Excusable.

In the Case of Justifiable Self-Defence the injured Party may repel Force with Force in Defence of his Person, Habitation, or Property, against one who manifestly intendeth and endeavoureth with Violence or Surprize to commit a known Felony upon either. In these Cases He is not obliged to retreat, but may pursue his Adversary 'till He findeth himself out of Danger, and if in a Conflict between them He happeneth to Kill, such Killing is Justifiable.

The Right of Self-Defence in these Cases is founded in the Law of Nature, and is not nor can be superseded by any Law of Society. For before Civil Societies were formed, one may conceive of such a State of Things though it is difficult to fix the Period when Civil Societies were formed, I say before Societies were formed for mutual Defence and Preservation, the Right of Self-Defence resided in Individuals; it could not reside elsewhere. And since in Cases of Necessity, Individuals incorporated into Society cannot resort for Protection to the Law of Society, that Law with great Propriety and strict Justice considereth them as *still in that Instance* under the Protection of the Law of Nature.

I will by way of Illustration state a few Cases which I conceive are reducible to this Head of Justifiable Self-Defence.

Where a known Felony is attempted upon the Person, be it to Rob or Murder, here the Party assaulted may repel Force with Force, and even his Servant then attendant on Him, or any Other Person present may interpose for preventing Mischief; and if Death ensueth, the Party so interposing will be justified. In this Case Nature and Social Duty cooperate.

He cites no authority whatsoever for this view except certain remarks of Chief Justice Holt delivering the opinion of the court in *Mawgridge's Case* (Kelyng's Cr. Cas. 119, 128), which were not intended to touch the point raised by Foster. It is doubtful whether the latter did not know that the law was not in fact as he stated it, and only desired to rationalize it. On page 289 he admits that Bracton and Fleta knew only one kind of self-defense—that which was barely excusable—and he might have added that no other writer before himself had even hinted at the two classes on which he lays so much stress.

As to self-defense which is culpable and merely excusable, Foster confines it to cases of a mutual, sudden brawl or affray (which he calls chance medley) (Cr. Law, p. 275). For this view he relies entirely on an analysis of the Stat. 24, Henry VIII, c. 5 (Crown Law, pp. 275, 276). This statute, however, does not afford the slightest basis for Foster's distinction. It merely attempted to correct the evil of the King's forfeiting the goods of persons who either could not bring them-

selves within the strictness of the common law as to homicides in aid of justice, or, if they could, had fled. This is shown by the authorities given above and by the discussion of it in Pollock and Maitland and Stephen. Reference may also be made to the case of *Punter v. Newman*, an appeal for murder reported in Anderson, p. 41. There, although the appellee had retreated as far as possible before killing, a forfeiture was decreed because the particular words of the statute, viz, that he had been assaulted on or near a highway with intent to murder, were not used. It must be understood that the word "murder" in the statute had a special meaning and implied cruelty and secret premeditation.

The fact that Foster was merely rationalizing about a law which, for lack of materials, he did not understand, can be seen from Hawkins (*Pleas of the Crown*, Vol. I, pp. 104-115), for while the latter divides homicides into justifiable and excusable, he places homicides in self-defense in the latter class, and places in the former only homicides in the nature of an aid to justice, as killing a robber or murderer attacking on a highway or in a house (*Pleas of the Crown*, p.108). This is clearly brought out by his statement on page 109 that he sees no reason why the law makes the distinction between robberies, etc., and the general case of one assaulting another in such a manner as to show an intent to murder him. He thinks that in both cases killing is justifiable, but he does not so state the law and evidently knew that it was not so.

It is evident, therefore, that Foster's statement does not represent the common law. What that law, apart from its archaic features, was is stated with entire correctness by Judge Campbell in *Pond v. People*, 8 Mich. 150, 177:

The essential difference between excusable and justifiable homicide rests not merely in the fact that at common law the one was felonious, although pardoned of course, while the other was innocent. *Those only were justifiable homicides where the slayer was regarded as promoting justice; and performing a public duty; and the question of personal danger did not necessarily arise, although it does generally.* [Italics ours.]

The archaic features which Foster did not understand and which caused him, therefore, to overlook the true distinction were that, owing perhaps to the idea of personal vengeance and compensation embodied in the murder fine and the appeal, or perhaps to the lack of any machinery for nicely distributing blame for homicide, the early common law made homicide by misadventure or in self-defense a crime. This not being in accord with more enlightened ideas, the King at first granted a pardon of his grace, then as of course, on a special verdict setting out the facts. It was easy from this to allow the jury to take the short cut of acquitting in such cases, and this was done. Such procedure, however, had no bearing whatsoever on the question, viz., what facts made out a case of self-defense, or what was the extent of the right of a person defending himself from an assault.

This always remained the same. A man could protect his person from unlawful assault and was excused for the results provided he did no more than was reasonably necessary under all the circumstances. This general principle is stated as early as Bracton, where it is said of homicides (f. 120 b):

From necessity, in which case it must be distinguished, whether that necessity was avoidable or not. But if it were avoidable, and he could avoid it without slaughter, then he will be guilty of homicide. But if it was inevitable, since he slew a man without any meditation of hatred, in fear and grief of mind, in delivering himself and his property, when he could not otherwise escape, he is not liable to the punishment of homicide.

From 1300 we may skip to 1910 and find the same principle stated in *Morse's Case*, 4 Cr. App. Cas.50, where the court said:

Now we will assume that appellant's statement is absolutely correct. That would justify him in defending himself, but in doing nothing more than was necessary in his own defence. But he, on being assaulted by Hill, did not casually pick up a razor lying near, but took one out of his pocket. That shows intention. He gave him not one but two cuts on the head, which were very dangerous. The case was quite properly left to the jury with the direction, "Did he use more violence than was reasonably necessary to repel the attack?"

So in the characteristically interesting and learned opinion of Judge Doe in *Aldrick v. Wright*, 53 N. H. 398, 404, 405, it is said, *inter alia*:

The right of defence is the right to do whatever apparently is reasonably necessary to be done in defence under the circumstances of the case.

It is reasonable that the kind and amount of defensive force should be measurably proportioned to the kind and amount of danger, to the apparent consequences of using the force, and the apparent consequences of not using it.

The right to kill a man in self-defence is not the test of the right to kill a dog in self-defence. Reasonable necessity is the test in both cases; but what is reasonably necessary against a canine assailant may not be reasonably necessary against a human one, although the same danger be caused by each.

Nevertheless, on account of Foster's great reputation and perhaps of his pseudo-philosophical language, his statement has had great weight, and has been repeated as law many times. Even so late as 1918 in Kenny's *Outlines of Criminal Law*, 8th ed., pp. 103, 104, it is repeated without comment or other citation of authority. On the other hand, we are not able to find that it has ever had any effect on actual cases in the English courts. In *R. v. Smith* (1837), 8 C. & P. 160, Bosanquet, J., with the concurrence of Bolland, B., and Coltman, J., said:

But there is another question, Did he use the weapon in defence of his life? Before a

person can avail himself of that defence, he must satisfy the jury that that defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance and no means of escape, in such case, if he retreated as far as he could, he will be justified.

In *R. v. Bull* (1839), 9 C. & P. 22, Vaughan, J., with the concurrence of Williams, J., said:

* * * the question for their consideration was, whether the conduct of the party made it *necessary* for the prisoner to inflict that blow which almost immediately terminated in the death of the deceased—whether he inflicted the wound in self-defence, to save his own life, which was in danger, or to protect himself from some dreadful bodily injury.

In *R. v. Knock* (1877), 14 Cox Cr. Cas. 1, Lindley, J., said:

But on the other hand, if a man attacks me, I am entitled to defend myself, and the difficulty arises in drawing the line between mere self-defence and fighting. The test is this: A man defending himself does not want to fight, and defends himself solely to avoid fighting.

In *R. v. Rose* (1884), 15 Cox Cr. Cas. 540, Lopes, J., said:

Homicide is excusable if a person takes away the life of another in defending him-

self, if the fatal blow which takes away life is necessary for his preservation. The law says not only in self-defence such as I have described may homicide be excusable, but also it may be excusable if the fatal blow inflicted was necessary for the preservation of life. * * * Therefore, I propose to lay the law before you in this form: If you think, having regard to the evidence, and drawing fair and proper inferences from it, that the prisoner at the bar acted without vindictive feeling towards his father when he fired the shot, if you think that at the time he fired that shot he honestly believed, and had reasonable grounds for the belief, that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of her life, then he ought to be excused, and the law will excuse him, from the consequences of the homicide.

In *R. v. Symondson* (1896), 60 Justice of the Peace 645, Kennedy, J., said:

There are cases in which the life of another may be taken not unlawfully, but such cases, where persons take the law into their own hands, must be watched very carefully. There are occasions in which the supreme necessity of self-defence protects the person who takes another's life: "The intentional infliction of death or bodily harm is not a crime when it is inflicted by any person in order to defend himself or any other person from unlawful violence, provided that the person inflicting

it inflicts no greater injury in any case than he in good faith and on reasonable grounds believes to be necessary when he inflicts it." (Stephen's Digest of the Criminal Law, art. 200.) But it is not any assault that will justify the use of the pistol; the danger measures the right.

As to the above quotation from Stephen's Digest, that authority is not quite clear. Stephen continues the citation above as follows:

(a) If a person is assaulted in such a manner as to put him in immediate and obvious danger of instant death or grievous bodily harm, he may defend himself on the spot, and may kill or wound the person by whom he is assaulted.

But immediately afterwards he says:

(c) If a person is unlawfully assaulted by another without any fault of his own, and otherwise than in the cases provided for in clauses (a) and (b), but with a deadly weapon, it is his duty to abstain from the intentional infliction of death or grievous bodily harm on the person assaulting, until he (the person assaulted) has retreated as far as he can with safety to himself.

It is difficult to see where (a) and (c), *supra*, differ, and it may be that Stephen means no more than that a man assaulted need not retreat if the danger is so imminent as to make retreat dangerous.

Foster's statement, *supra*, has, however, been often quoted, and relied on by the courts of this

country, but it is not clear that it had any effect on the Federal courts prior to the decision in *Beard's Case*, 158 U. S. 550. It is true that in *United States v. Travers* (1814), 2 Wheeler Cr. Cas. 490, Judge Davis (pp. 497, 498), and Justice Story (p. 507) state the law almost in Foster's language, but it is not clear that the point was important in the case or was called to the attention of the judges. In *United States v. Wiltberger* (1819), 3 Wash. 515, 521, Justice Washington said:

As to this, the law is, that a man may oppose force to force, in defence of his person, his family, or property, against one who manifestly endeavors, by surprise, or violence, to commit a felony, as murder, robbery, or the like. * * *

In the next place, the intent to commit a felony must be apparent, which will be sufficient; although it should afterwards turn out that the real intention was less criminal, or was even innocent. This apparent intent is to be collected from the attending circumstances, such as the manner of the assault, the nature of the weapons used, and the like; *and, lastly, to produce this justification, it must appear that the danger was imminent, and the species of resistance used necessary to avert it.* [Italics ours.]

In *United States v. Outerbridge* (1868), 5 Sawyer 620, Justice Field adopts the language of Justice Washington quoted above.

In *United States v. Mingo* (1854), 2 Curt. 1, 5, Justice Curtis said:

If it was not a mutual combat, but Johnson made the first attack on Mingo with a deadly weapon, yet if Mingo could reasonably have avoided killing his adversary, without certain and immediate danger of his life, or of great bodily injury, the homicide is not excused as being in self-defence.

In *United States v. King* (1888), 34 Fed. 302, 307, 308, Judge Lacombe said:

Was this homicide excusable? Now, there are varieties of excusable homicide. For instance, homicide by misadventure—that is, by pure accident, without negligence—is excusable. But the only kind of excusable homicide that there is any pretense of here, or that you need in any way concern yourselves with is what is known as “homicide in self-defense.” Under the law a person has a right to resist the application of force to himself with force proportioned to the attack. * * * If an assailant comes against me with a deadly weapon, apparently meaning to use it, or if without such a weapon he assails me, breathing forth threatenings and slaughter, or by any other means indicating that it is his intention to inflict upon me a beating of such a character as to imperil life, or to maim me, or do me grievous bodily harm, then I may take life, when necessary to repel the assault. That is the general rule, and I have no doubt that it commends itself to your good sense.

But, like all rules, it must be studied with its qualifications; and the first qualification to which I desire to call your attention is this: It is my duty when attacked to retreat as far as the fierceness of the assault would permit.

* * * The rule laid down by later authorities and sanctioned by text writers of ability is this: It is the duty of the assailed to abstain from the infliction of death until he has retreated as far as he can with safety to himself. Here let me call your attention to a very apt illustration which is used—whether in a reported case or whether as the expression of a text writer I am not certain, but it is a convenient illustration to have before you. Manslaughter and excusable homicide, as you will see later on, approach each other very nearly, and the distinction between them is thus indicated: "In excusable homicide the slayer could not escape if he would; in manslaughter he would not escape if he could."

The law was similarly stated with emphasis upon the duty to retreat by Judge Maxey in *United States v. Lewis* (1901), 111 Fed. 630, 635.

The above observations and citations of authority are necessary on account of the apparent want of harmony in the language used in the opinions of this Court on the subject of the duty to retreat before an unlawful assault, which decisions must now be considered.

In *Beard v. United States* (1895), 158 U. S. 550, Mr. Justice Harlan, delivering the opinion of the

Court, after referring with evident approval to the leading cases denying the duty to retreat, namely, *Erwin v. State*, 29 O. S. 186, and *Runyan v. State*, 57 Ind. 80, and to Foster's statement of the law as given above, said (158 U. S. 564):

The defendant was where he had the right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.

In this case the defendant was in his own house, and in view of the decision hereafter discussed in *Allen v. United States* (164 U. S. 492), it should be limited as relating to a man's right not to retreat when assailed in his own house.

In *Alberty v. United States* (1896), 162 U. S. 499, 507, 508, Mr. Justice Brown, delivering the opinion of the Court, refers to *Beard's Case* as representing the law, but his statement lays so much stress on the peculiar facts of the case before him, viz., the

deceased's attempt at night to gain access to the room of the wife of the defendant, as to make it doubtful whether he means to lay down any general principle. This case might well stand on the right to repel invasion of one's house and protection of one's wife.

In *Rowe v. United States* (1896), 164 U. S. 546, 557, Mr. Justice Harlan, delivering the opinion of the Court (Justices Brown and Peckham dissenting), quotes the language given above in *Beard's Case*, and says it represents "the principle announced" in that case.

In *Addington v. United States* (1897), 165 U. S. 180, 187, Mr. Justice Harlan, delivering the opinion of the Court, said of a charge that a person assaulted and placed in peril of his life or great bodily harm was under a duty "to avoid the threatened danger if he can" "might" be inconsistent with the right of self-defense as defined in *Beard's Case*, but that the error, if any, was cured by a charge that the defendant should be acquitted if the jury believed "that the means he used were the only reasonable means at his command to avert the threatened danger, and that he only fired in his own actual self-defense." Mr. Justice Harlan continued:

This instruction is not liable to the objection that it recognized Addington's right to take the life of his adversary only upon its appearing that he was, in fact, in actual danger of losing his own life or of receiving serious bodily harm. On the contrary, the

court said, in substance, that if the circumstances were such as to produce upon the mind of Addington, as a reasonably prudent man, the impression that he could save his own life, or protect himself from serious bodily harm, *only* by taking the life of his assailant, he was justified by the law in resorting to such means, * * *. [Italics ours.]

It is not clear, therefore, whether Mr. Justice Harlan meant, in *Addington's Case*, to reaffirm the general statement of the right to kill without retreating, made by him in *Beard's Case*, or not, or to extend it beyond the exact case there presented.

On the other hand, in *Allen v. United States* (1896), 164 U. S. 492, the trial court gave the following charge (164 U. S. 497):

The law of self-defence is a law of proportions as well as a law of necessity, and it is only danger that is deadly in its character, or that may produce great bodily harm, against which you can exercise a deadly attack. If he is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm from which death or permanent injury may follow, in such a case he may lawfully kill the assailant. When? Provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling him without killing him, if it be in his power.

Of this charge Mr. Justice Brown, delivering the opinion of the court, said (164 U. S. 498):

Nor is there anything in the instruction of the court that the prisoner was bound to retreat as far as he could before slaying his assailant that conflicts with the ruling of this court in *Beard v. United States*, 158 U. S. 550. That was the case of an assault upon the defendant upon his own premises, and it was held that the obligation to retreat was no greater than it would have been if he had been assailed in his own house. So, too, in the case of *Alberty v. United States*, 162 U. S. 499, the defendant found the deceased trying to obtain access to his wife's chamber through a window, in the night time, and it was held that he might repel the attempt by force, and was under no obligation to retreat if the deceased attacked him with a knife. The general duty to retreat instead of killing when attacked was not touched upon in these cases. Whart. on Homicide, § 485.

To this statement there was no dissent.⁴

In *Andersen v. United States* (1898), 170 U. S. 481, 508, Chief Justice Fuller, delivering the opinion of the court, said that to make homicide excusable as in self-defense it must appear that it "was necessary in order to avoid the death or great bodily harm which was apparently imminent," and *Allen's Case* was cited with approval.

These appear to be all the relevant cases in this court on the question. The difficulty in properly

⁴ *Allen's Case*, though reported before *Rowe's Case*, was in fact decided after it.

weighing them is increased by the possibility that the language used in them may have been colored by the facts peculiar to each. The statement of Mr. Justice Harlan in *Beard's Case* may be (and was by Mr. Justice Brown in *Allen's Case*) explained as laying down a rule applicable only to the case where the assaulted person is within the protection of his mansion or its curtilage. Under such circumstances there is evidently nowhere the assaulted person can retreat with safety, his house being for such purposes his wall or ditch. On the other hand, the petitioner herein claims, with some force, that in *Allen's Case* there was no assault with a deadly weapon, the deceased merely having a "willow stick with the bark peeled off with which to kill frogs." (150 U. S. 552.) The Court of Appeals in the present case distinguished *Beard's Case* on the ground just stated, and held *Allen's Case* controlling (257 Fed. 52-54).

No useful purpose could be served by commenting on or citing the numerous cases in the State courts expressing contrary views on the point now under consideration. They can be found in Wharton on Homicide, 3d ed., § 292, p. 469, n. 1; § 294, p. 471, 472, n. 1; in 21 Cyc., p. 822, n. 3 and 4; and in Professor Beale's Article on Self-Defence in Homicide, 3 Columbia L. R., p. 539, n. 5, p. 540, n. 1.

Leaving out of view for the moment the question as to the correct rule on reason and principle, we claim that we have absolutely established by what has been said above that the common law gives no justification whatsoever to the claim of the petitioner

herein or to the general statement of Mr. Justice Harlan in *Beard's Case*. Two propositions may be confidently asserted as to that law.

1. It knew nothing of two kinds of homicide in self-defense, mutually destructive. If Foster's statement were correct it would follow that on an assault with manifest intent to commit a known felony on the person assaulted there would be (a) no duty to retreat generally, but (b) a duty to retreat if this manifest assault was part of a "chance medley." Such a distinction is clearly impracticable and impossible of application before a jury. It merely adds an artificial, refined distinction to a subject which, as much as any, should be kept clear and simple. How can a jury determine, first, whether the assault was or was not made with manifest intent to commit a felony on the person assaulted, and then, second, whether the line had or had not been crossed which made the affair a "chance medley," a brawl, or an affray, and hence made the assault with manifest intent to commit a felony immaterial? It would do nothing but confuse the jury to tell them that if the defendant was assaulted with manifest intent to commit a felony he need not retreat, but that if he was so assaulted in a chance medley he must. The common law had no such antinomy but treated all cases of self-defense upon the same principles.

2. As it recognized only one species of homicide in self-defense, so the common law applied without question to all such homicides the rule that the person assaulted was under duty to avoid killing his assailant

by retreating, if that was practically possible under the circumstances as they appeared to him. Of this there can be no doubt. It is so stated in all the authorities. Even Foster admits it as to what he calls excusable homicide in self-defense; and when his distinction of two species of such homicides disappears (as it does in so far as the common law is concerned), the rule, since its existence is admitted, must extend as well to his so-called justifiable homicide in self-defense.

Even assuming that Foster's statement can be taken as in any way representing the common law, it should not be extended to cases (like the present) where the assault from which the right to kill is derived is no more than, but, on the contrary, is exactly equivalent to the assault with manifest intent to commit a felony specified in the alleged rule. On the contrary, the doctrine of Foster, if it is to be adopted at all, should be limited to cases where the assault in question is merely a collateral means to carry out an independent intent to commit a felony, as where A lies in wait for B, to murder him, and on his approach attacks him. If the rule be so limited, it does not apply to the case at bar because there is no evidence of any independent intent on the part of Hermis to murder petitioner, but, on the contrary, the evidence of the latter himself shows that Hermis came to the excavation to haul dirt, and that the assault was induced by petitioner's statement in regard to such hauling.

Assuming, therefore, that no support can be found in the common law for the claim of the petitioner herein, and assuming further that *Allen's Case, supra*, is not a direct authority against that claim (we submit that it is), the only remaining question is, what rule best conforms to principle and reason?

The general basic principle which must govern the answer to this question can hardly be disputed. In order to excuse (or to justify, if that word be preferred) the taking of human life, it must appear that the killing was reasonably necessary to protect other interests which for good reasons the law regards as more important, under all the circumstances, than the continued existence of the life in question. The difficulty lies in defining such "other interests." In so far as self-defense is concerned, the normal case of another interest is the life of a person other than the one killed. If the protection of that life makes necessary the homicide in question, there can be no doubt that the law must excuse or justify the killing. An extension of the same principle justifies protection of the person from great bodily harm. This principle, however, would evidently require, as a mere expansion of the content of the idea, that the homicide in question be reasonably necessary to protect another person from death or great bodily harm. If it be not so reasonably necessary, if the homicide could be avoided without danger of death or great bodily harm, the justification or excuse fails. But one evident method of avoiding a homicide is to avoid a conflict

from which it may arise, and hence to retreat if assaulted, provided such a retreat would, under all the circumstances as they present themselves to the person assaulted, accomplish the end desired by the law viz, to preserve human life if it can be done without seriously endangering other human lives. The rule of the common law, therefore, that the person assaulted is bound to retreat provided such a retreat would not be dangerous to his personal safety, is clearly founded on a reasonable, sensible principle, and goes as far as such reasonable principle requires, if the only "other interest" had in mind is the life and personal safety of the one assaulted.

The rule laid down by Foester and approved by Mr. Justice Harlan, however, viz, that a person assaulted under such circumstances as to induce a reasonable belief that his life is aimed at need not retreat nor consider whether he can safely retreat, but may stand his ground and kill, must be supported by a respect for some interest which the law ought to protect other than human life or personal safety, since the latter are sufficiently protected by the very terms of the common law rule. The only "other interest" which (so far as we can see) can be had in mind is the self-respect and honor of the person assaulted. The question therefore is whether such self-respect and honor are in the eye of the law sufficient to weigh down the balance as against human life. We submit that they are not. A lengthy argument would not be justified, as the matter is one depending upon general considerations of life in civilised so-

cieties known to all intelligent persons. We can not do better than quote Professor Beale's language in 16 Harv. Law Rev., pp. 581, 582:

A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow-being on his hands. It is undoubtedly distasteful to retreat; but it is ten times more distasteful to kill. The position of the assailed is an unpleasant one. The law can not help that; it is incapable of protecting him from the painful alternative; but the necessity of undergoing illegal injuries is one of the penalties of life in society. He does not avoid his predicament by killing. • • •

If the law is to be carried out it must protect the state against such homicides. The interests of the state alone are to be regarded in justifying crime; and those interests require that one man should live rather than that another should stand his ground in a private conflict.

IV.

REFUSAL TO GIVE CHARGE ON ASSAULT WITH INTENT TO MURDER.

The petitioner requested the judge (R. 168, 169) to charge that if the jury had a reasonable doubt whether the third or fourth shot was fatal, and if the third shot was fired under excusable circumstances, though the fourth shot was not, then the

petitioner would be guilty only of assault with intent to murder, in violation of section 276, Criminal Code. The following assumptions are involved in this request; (a) the third shot was the fatal one; (b) it was fired in self-defense; (c) the fourth shot was intentional; (d) it was not fired in self-defense; (e) it was not sufficient, taken in connection with the other shots, to produce death. As to (b) the jury is asked to credit petitioner's testimony; as to (c) it is asked to discredit it; as to (a) it is asked to believe that a man with the thoracic aorta completely severed could still attack and strike as petitioner testified Hermis did (R. 132); as to (e) it is asked to pass upon a matter of which it could know nothing on the testimony before it. Such a mixture of unfounded, inconsistent hypotheses furnishes no basis for a charge to a jury in a trial of homicide, unless the trial is looked at as a game in which the defendant is permitted to escape if he can raise dust and smoke enough to conceal him while he is getting away.

CONCLUSION.

The judgment of the District Court should be affirmed.

ROBERT P. STEWART,
Assistant Attorney General.
 W. C. HERRON, *Attorney.*



BROWN *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

No. 103. Argued November 19, 1920.—Decided May 16, 1921.

1. The right of a man to stand his ground and defend himself when attacked with a deadly weapon, even to the extent of taking his assailant's life, depends upon whether he reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant, and not upon the detached test whether a man of reasonable prudence, so situated, might not think it possible to fly with safety or to disable his assailant rather than kill him. P. 343. *Beard v. United States*, 158 U. S. 550.
2. So held of a homicide committed on a post-office site by one who was there in discharge of his duty. P. 344.
3. In a prosecution for murder, it appeared that the defendant shot the deceased several times and again when the deceased had fallen and was lying on the ground. Held, that evidence of self-defense

was for the jury, and that, if they disbelieved the defendant's testimony that the last shot was an accident, they might still have acquitted him if, though intentional, it followed close upon the others in the heat of the conflict and while he believed he was fighting for his life. P. 344.

257 Fed. Rep. 46, reversed.

CERTIORARI to review a judgment of the Circuit Court of Appeals affirming a judgment of the District Court upon a conviction of murder in the second degree. The facts are given in the opinion, *post*, 341.

Mr. James R. Dougherty and *Mr. E. C. Brandenburg*, with whom *Mr. W. E. Pope*, *Mr. Gordon Boone* and *Mr. H. S. Bonham* were on the brief, for petitioner:

The court below erred in not holding that the indictment upon its face did not charge any offense either against the laws of the United States, or within the territorial jurisdiction of the United States.

It was error to instruct the jury that petitioner, though in a place where he had a right to be and though the deceased was making a felonious assault upon him, with intent to kill him or do him some serious bodily injury, was obliged to retreat, though without fault on his part, before he could exercise his right of self-defense, and slay the deceased.

The duty to retreat did not exist in cases of justifiable homicide or justifiable self-defense at the common law. *Russell on Crimes*, 3d Amer. ed., pp. 508-521; 1 *Bishop's New Criminal Law*, §§ 849, 850, 851; 1 *Hale's Pleas of the Crown*, 479-481; 4 *Blackstone's Comm.* 185; 3 *Coke's Inst.* 55, 56; *Foster's Crown Cases*, p. 273; 1 *East, Pleas of the Crown*, p. 271; *Hawkins, Pleas of the Crown*, 7th ed., vol. 1, p. 172; 2 *Wharton, Criminal Law*, § 1019; *Wharton, Homicide*, § 485; *Beard v. United States*, 158 U. S. 550; *Allen v. United States*, 150 U. S. 551, 562; s. c. 164 U. S. 492-497; *Rowe v. United States*, 164 U. S. 546;

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Erwin v. State, 29 Oh. St. 186; *Runyan v. State*, 57 Indiana, 80, 83; *United States v. Wiltberger*, Fed. Cas. No. 16,738; *United States v. Outerbridge*, 5 Sawy. 620; *Carpenter v. State*, 62 Arkansas, 286; *State v. Cain*, 20 W. Va. 679; *State v. Clark*, 51 W. Va. 457; *Pond v. People*, 8 Michigan, 150; *State v. Gentry*, 125 N. Car. 733.

A man need not retreat from his place of business when feloniously assaulted, but may stand his ground. A servant or employer has the same right as the owner. If petitioner had owned the lot he would not have been obliged to retreat. He was at the place of his business or his master's business. We submit that this gave him the right to stand his ground. *Andrews v. State*, 159 Alabama, 14; *Cary v. State*, 76 Alabama, 78; *State v. Goodager*, 56 Oregon, 198; *Haynes v. State*, 17 Georgia, 465; *Suell v. Derricott*, 161 Alabama, 259.

The right to defend one's home, even to the point of slaying a forcible intruder, or one who assaulted the owner therein, does not seem to have depended at the common law entirely upon the fact that the slayer was assaulted feloniously, that is, with an intent to kill him. 1 Bishop's New Criminal Law, § 858; 1 Hale's Pleas of the Crown, 458; *Aldrich v. Wright*, 53 N. H. 398.

Mr. Assistant Attorney General Stewart, with whom *Mr. W. C. Herron* was on the brief, for the United States:

The question first arises whether any charge as to the law of self-defense was necessary and whether, therefore, the charge as given and complained of by the petitioner may not be disregarded on this writ. Act of February 26, 1919, c. 48, 40 Stat. 1181; *Doremus v. United States*, 262 Fed. Rep. 849, 853; *Battle v. United States*, 209 U. S. 36, 38; *Addington v. United States*, 165 U. S. 184, 187.

The common law never recognized two species of homicide in self-defense, one justifiable and the other excusable; one dispensing with avoidance of, or retreat

from, an assault with a deadly weapon, the other requiring it; on the contrary, the common law, in every case where public interests, *e. g.*, aid of justice, were not involved, required the assaulted person to avoid homicide, if he could do so without endangering the life of himself or another. 2 Pollock & Maitland's History of English Law, pp. 476-481; 3 Stephen, History of Criminal Law, pp. 36-41, 47, 49; Beale, Retreat from Murderous Assault, 16 Harv. Law Rev. 567; Bracton (1250), Twiss ed., c. v, bk. 3, ff. 104b, 134, 144b; Britton (1290), c. vi, pp. 34 *et seq.*, 113; Bracton's Note Book Nos. 1084, 1215; *Howel's Case* (1221), Kenny's Cas. on Crim. Law, pp. 139, 141, 142; Y. B. 30-31, Edw. I, 510, 512 (1302); 6 Edw. I, c. 9; Fitzherbert's Abridgement, Title Corone Nos. 261, 284-287, 305; *Compton's Case*, 22 Lib. Ass. 97, pl. 55; 24 Henry VIII, c. 5; *Cooper's Case* (1663), Cro. Car. 544; 3 Coke's Inst., c. 8, p. 55; 1 Hale's Pleas of the Crown, pp. 424, 425, 478 *et seq.*; *Daver's Case* (1623), Godbolt, 288; *Calfield v. The Keeper*, Roll's Reps. 189.

Counsel rely largely upon Foster's view—that, in case of justifiable self-defense, the assaulted party may repel force with force and is not obliged to retreat—(*Foster's Crown Cases*, pp. 255, 267, 273), and upon *Beard v. United States*, 158 U. S. 550, 564, which sustains their view. But Foster's statement does not represent the common law. 1 Hawkins, Pleas of the Crown, pp. 104-115; *Pond v. People*, 8 Michigan, 150, 177; Bracton, *supra*, f. 120b; *Morse's Case*, 4 Cr. App. Cas. 50; *Aldrich v. Wright*, 53 N. H. 398, 404, 405. Though repeated as law many times, it has never had any effect on actual cases in the English courts. See *Rex v. Smith*, 8 C. & P. 160; *Rex v. Bull*, 9 C. & P. 22; *Rex v. Knock*, 14 Cox Cr. Cas. 1; *Rex v. Rose*, 15 Cox Cr. Cas. 540; *Rex v. Symondson*, 60 J. P. 645. Foster has been often quoted and relied on by the courts of this country, but it is not clear that his view had any effect on the federal courts prior

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to the *Beard Case* (1895). See *United States v. Willberger* (1819), 3 Wash. 515, 521; *United States v. Outerbridge* (1868), 5 Sawy. 620; *United States v. Mingo* (1854), 2 Curt. 1, 5; *United States v. King* (1888), 34 Fed. Rep. 302, 307, 308; *United States v. Lewis* (1901), 111 Fed. Rep. 630, 635. In *United States v. Travers* (1814), 2 Wheeler Cr. Cas. 490, 497, 498, 507, the law is stated almost in Foster's language, but it is not clear that the point was important in the case or was called to the attention of the judges. In the *Beard Case*, the defendant was on his own premises, and, in view of the subsequent decisions in *Allen v. United States*, 164 U. S. 492, 497, 498, and *Alberty v. United States*, 162 U. S. 499, 507, 508, that decision should be limited to the right not to retreat when assaulted in one's own house. It is not clear whether, in *Addington v. United States*, 165 U. S. 184, 187, the court meant to reaffirm the general statement of the right to kill without retreating, made in the *Beard Case*, or not, or to extend it beyond the exact case there presented.

The common law knew nothing of two kinds of homicide in self-defense, mutually destructive. If Foster's statement were correct it would follow that on an assault with manifest intent to commit a known felony on the person assaulted there would be (a) no duty to retreat generally, but (b) a duty to retreat if this manifest assault was part of a "chance medley." Such a distinction is clearly impracticable and impossible of application before a jury.

As it recognized only one species of homicide in self-defense, so the common law applied without question to all such homicides the rule that the person assaulted was under duty to avoid killing his assailant by retreating, if that was practically possible under the circumstances as they appeared to him. Even Foster admits it as to what he calls excusable homicide in self-defense; and when his distinction of two species of such homicides disappears

(as it does in so far as the common law is concerned), the rule, since its existence is admitted, must extend as well to his so-called justifiable homicide in self-defense.

Even assuming that Foster's statement can be taken as in any way representing the common law, it should not be extended to cases (like the present) where the assault from which the right to kill is derived is no more than, but, on the contrary, is exactly equivalent to the assault with manifest intent to commit a felony specified in the alleged rule. The doctrine of Foster, if adopted at all, should be limited to cases where the assault is merely a collateral means to carry out an independent intent to commit a felony, as where A lies in wait for B, to murder him, and on his approach attacks him. If the rule be so limited, it does not apply to the case at bar because there is no evidence of any independent intent on the part of Hermes to murder petitioner, but, on the contrary, the evidence of the latter himself shows that Hermes came to the excavation to haul dirt, and that the assault was induced by petitioner's statement in regard to such hauling.

In order to excuse or to justify the taking of human life, it must appear that the killing was reasonably necessary to protect other interests which for good reasons the law regards as more important, under all the circumstances, than the continued existence of the life in question. The difficulty lies in defining such "other interests." In so far as self-defense is concerned, the normal case of another interest is the life of a person other than the one killed. If the protection of that life makes necessary the homicide in question, there can be no doubt that the law must excuse or justify the killing. But one evident method of avoiding a homicide is to avoid a conflict from which it may arise, and hence to retreat if assaulted, provided such a retreat would, under all the circumstances as they present themselves to the person assaulted, accomplish the end desired by the law, viz., to preserve

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human life if it can be done without seriously endangering other human lives. The rule of the common-law, therefore, that the person assaulted is bound to retreat provided such a retreat would not be dangerous to his personal safety, is clearly founded on a reasonable, sensible principle, and goes as far as such reasonable principle requires, if the only "other interest" had in mind is the life and personal safety of the one assaulted.

The rule laid down by Foster and approved in the *Beard Case* must be supported by a respect for some interest which the law ought to protect other than human life or personal safety, since the latter are sufficiently protected by the very terms of the common-law rule. The only "other interest" which can be had in mind is the self-respect and honor of the person assaulted. The question therefore is whether such self-respect and honor are in the eye of the law sufficient to weigh down the balance as against human life. We submit that they are not.

MR. JUSTICE HOLMES delivered the opinion of the court.

The petitioner was convicted of murder in the second degree committed upon one Hermes at a place in Texas within the exclusive jurisdiction of the United States, and the judgment was affirmed by the Circuit Court of Appeals. 257 Fed. Rep. 46. A writ of certiorari was granted by this Court. 250 U. S. 637. Two questions are raised. The first is whether the indictment is sufficient, inasmuch as it does not allege that the place of the homicide was acquired by the United States "for the erection of a fort, magazine, arsenal, dock-yard, or other needful building," although it does allege that it was acquired from the State of Texas by the United States for the exclusive use of the United States for its public purposes and was under the exclusive jurisdiction of the same. Penal Code of March 4, 1909, c. 321, § 272, Third. 35 Stat. 1088.

Constitution, Art. I, § 8. In view of our opinion upon the second point we think it unnecessary to do more than to refer to the discussion in the Court below upon this.

The other question concerns the instructions at the trial. There had been trouble between Hermes and the defendant for a long time. There was evidence that Hermes had twice assaulted the defendant with a knife and had made threats communicated to the defendant that the next time, one of them would go off in a black box. On the day in question the defendant was at the place above mentioned superintending excavation work for a postoffice. In view of Hermes's threats he had taken a pistol with him and had laid it in his coat upon a dump. Hermes was driven up by a witness, in a cart to be loaded, and the defendant said that certain earth was not to be removed, whereupon Hermes came toward him, the defendant says, with a knife. The defendant retreated some twenty or twenty-five feet to where his coat was and got his pistol. Hermes was striking at him and the defendant fired four shots and killed him. The judge instructed the jury among other things that "it is necessary to remember, in considering the question of self-defense, that the party assaulted is always under the obligation to retreat, so long as retreat is open to him, provided he can do so without subjecting himself to the danger of death or great bodily harm." The instruction was reinforced by the further intimation that unless "retreat would have appeared to a man of reasonable prudence, in the position of the defendant, as involving danger of death or serious bodily harm" the defendant was not entitled to stand his ground. An instruction to the effect that if the defendant had reasonable grounds of apprehension that he was in danger of losing his life or of suffering serious bodily harm from Hermes he was not bound to retreat was refused. So the question is brought out with sufficient clearness whether the formula

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laid down by the Court and often repeated by the ancient law is adequate to the protection of the defendant's rights.

It is useless to go into the developments of the law from the time when a man who had killed another no matter how innocently had to get his pardon, whether of grace or of course. Concrete cases or illustrations stated in the early law in conditions very different from the present, like the reference to retreat in Coke, Third Inst. 55, and elsewhere, have had a tendency to ossify into specific rules without much regard for reason. Other examples may be found in the law as to trespass *ab initio*, *Commonwealth v. Rubin*, 165 Massachusetts, 453, and as to fresh complaint after rape. *Commonwealth v. Cleary*, 172 Massachusetts, 175. Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt. The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature. Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self-defense. That has been the decision of this Court. *Beard v. United States*, 158 U. S. 550, 559. Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him. *Rowe v. United States*, 164 U. S. 546, 558. The law of Texas very strongly adopts these views as is shown by many cases, of which it is enough to cite two. *Cooper v. State*, 49 Tex. Crim. Rep. 28, 38. *Baltrip v. State*, 30 Tex. Ct. App. 545, 549.

It is true that in the case of Beard he was upon his own land (not in his house), and in that of Rowe he was in the room of a hotel, but those facts, although mentioned by the Court, would not have bettered the defence by the old common law and were not appreciably more favorable than that the defendant here was at a place where he was called to be, in the discharge of his duty. There was evidence that the last shot was fired after Hermes was down. The jury might not believe the defendant's testimony that it was an accidental discharge, but the suggestion of the Government that this Court may disregard the considerable body of evidence that the shooting was in self-defence is based upon a misunderstanding of what was meant by some language in *Battle v. United States*, 209 U. S. 36, 38. Moreover if the last shot was intentional and may seem to have been unnecessary when considered in cold blood, the defendant would not necessarily lose his immunity if it followed close upon the others while the heat of the conflict was on, and if the defendant believed that he was fighting for his life.

The Government presents a different case. It denies that Hermes had a knife and even that Brown was acting in self-defence. Notwithstanding the repeated threats of Hermes and intimations that one of the two would die at the next encounter, which seem hardly to be denied, of course it was possible for the jury to find that Brown had not sufficient reason to think that his life was in danger at that time, that he exceeded the limits of reasonable self-defence or even that he was the attacking party. But upon the hypothesis to which the evidence gave much color, that Hermes began the attack, the instruction that we have stated was wrong.

Judgment reversed.

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE dissent.